

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, : Civil Action 96-1285  
et al. :  
Plaintiffs :  
V. : Washington, D.C.  
: Wednesday, October 10, 2007  
DIRK KEMPTHORNE, Secretary :  
of the Interior, et al. :  
Defendants : MORNING SESSION

TRANSCRIPT OF EVIDENTIARY HEARING  
DAY 1  
BEFORE THE HONORABLE JAMES ROBERTSON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

DENNIS GINGOLD, ESQUIRE  
LAW OFFICES OF DENNIS GINGOLD  
607 14th Street, NW  
Ninth Floor  
Washington, DC 20005  
(202) 824-1448

ELLIOTT H. LEVITAS, ESQUIRE  
WILLIAM E. DORRIS, ESQUIRE  
KILPATRICK STOCKTON, L.L.P.  
1100 Peachtree Street  
Suite 2800  
Atlanta, Georgia 30309-4530  
(404) 815-6450

KEITH HARPER, ESQUIRE  
JUSTIN GUILDER, ESQUIRE  
KILPATRICK STOCKTON, L.L.P.  
607 14th Street, N.W.  
Suite 900  
Washington, D.C. 20005  
(202) 585-0053

DAVID C. SMITH, ESQUIRE  
KILPATRICK STOCKTON, L.L.P.  
1001 West Fourth Street  
Winston-Salem, North Carolina 27101  
(336) 607-7392

Page 2

For the Defendants:

ROBERT E. KIRSCHMAN, JR., ESQUIRE  
JOHN WARSHAWSKY, ESQUIRE  
MICHAEL QUINN, ESQUIRE  
J. CHRISTOPHER KOHN, ESQUIRE  
U.S. Department of Justice  
1100 L Street, N.W.  
Washington, D.C. 20005  
(202) 307-0010

JOHN STEMPLEWICZ, ESQUIRE  
Senior Trial Attorney  
U.S. Department of Justice  
Commercial Litigation Branch  
Civil Division  
Ben Franklin Station  
P.O. Box 975  
Washington, D.C. 20044  
(202) 307-1104

GLENN D. GILLET, ESQUIRE  
U.S. Department of Justice  
Commercial Litigation Branch  
Civil Division  
P.O. Box 875  
Ben Franklin Station  
Washington, D.C. 20044  
(202) 514-7162

Court Reporter:

REBECCA STONESTREET  
Official Court Reporter  
Room 6415, U.S. Courthouse  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001  
(202) 354-3249

Proceedings reported by machine shorthand, transcript produced  
by computer-aided transcription.

C O N T E N T S

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
JAMES CASON				
By Mr. Stemplewicz	51	--	--	--
By Mr. Dorris	--	89	--	--

E X H I B I T S

NUMBER	ADMITTED
--------	----------

(No Exhibits Moved into Evidence.)

1 P R O C E E D I N G S

2 COURTROOM DEPUTY: This is Civil Action 96-1285,  
3 Elouise Pepion Cobell, et al. versus Kempthorne. Counsel,  
4 please identify yourselves for the record.

5 THE COURT: Those who are going to be speaking this  
6 morning.

7 MR. KIRSCHMAN: Your Honor, Robert Kirschman for the  
8 Defendants.

9 THE COURT: Mr. Kirschman.

10 MR. STEMPLEWICZ: Mr. Stemplewicz for the Defendants,  
11 Your Honor.

12 THE COURT: Mr. Stemplewicz.

13 MR. GINGOLD: Dennis Gingold for Plaintiffs.

14 THE COURT: Mr. Gingold.

15 MR. HARPER: Keith Harper for Plaintiffs.

16 THE COURT: Mr. Harper.

17 MR. DORRIS: Bill Dorris for the Plaintiffs.

18 THE COURT: Mr. Dorris.

19 Good morning, everybody. Couple of ground rules for  
20 those of you who haven't been in my courtroom before, and for  
21 our courtroom deputy, who is sitting in today for our regular  
22 courtroom deputy. She is welcome. And that is, all this  
23 getting up and sitting down that we do when judges come in and  
24 leave the bench, we do it once a day in my courtroom, in the  
25 morning, to preserve the dignity of the office. After that,

1 it's remain seated, okay? You don't need that much exercise.

2 We are here for day one of the -- of who knows how many  
3 days of the trial of Cobell versus Kempthorne. It is a trial  
4 that's been a long time in the making. I have no preliminary  
5 statements to make. I assume that counsel want to give opening  
6 statements. I hope they're brief, because I want to get right  
7 on to start hearing testimony.

8 Who goes first? Mr. Kirschman?

9 MR. KIRSCHMAN: Thank you, Your Honor.

10 THE COURT: Good morning, sir.

11 MR. KIRSCHMAN: Good morning, Your Honor.

12 Your Honor, this is admittedly an unusual APA case.  
13 For that reason, defendants will be proceeding first in this  
14 case, and will be providing the Court with evidence and  
15 testimony to supplement the administrative record that was  
16 already filed with the Court earlier this year.

17 We will be presenting witnesses and evidence that will  
18 further assist the Court in understanding the work that the  
19 Department of the Interior has accomplished over the past years,  
20 related to the performance of the historical accounting.

21 The witnesses and testimony will also provide the Court  
22 further explanation regarding the decisions and the rationale  
23 behind the 2007 plan to complete the historical accounting. And  
24 also, Your Honor, the testimony and evidence you will hear in  
25 the coming days will address the issue of throughput, those

Page 6

1 issues that the Court has indicated it wants to hear about. And  
2 that was raised, I believe in the June 18th hearing.

3 So these coming days, we'll be here to assist the Court  
4 in further understanding the administrative record.

5 In summary, Your Honor, the evidence and the testimony  
6 will demonstrate the following: First and foremost, Your Honor,  
7 that the historical accounting can be and is being accomplished,  
8 and it is being accomplished in a structured and orderly manner.

9 There is no unreasonable delay going on, and there's no  
10 basis for such a finding, Your Honor. Instead, the evidence you  
11 will hear will demonstrate that Interior is indeed curing the  
12 breach of the fiduciary duty that was found by the Court of  
13 Appeals back in 2001.

14 There's a large reason for this, Your Honor, and that  
15 is that the documents and data necessary to perform the  
16 historical accounting are variable, and they have been  
17 demonstrated to be accurate and reliable. They are being used  
18 effectively and efficiently by both the Department of the  
19 Interior and the department's contractors.

20 It's important to note, and you will hear testimony on  
21 this, Your Honor, that Congress as settler of the Trust has  
22 appropriated limited funds over the years; however, it's also  
23 important to note, Your Honor, that the Department of the  
24 Interior is utilizing all of those funds, and doing so  
25 efficiently and with careful consideration.

1 Interior's 2007 plan to complete the historical  
2 accounting resulted from an analysis that is rational and  
3 supported by the record and the law.

4 This analysis weighs two principal concerns, and you'll  
5 hear testimony and see evidence of this during the course of the  
6 hearing, Your Honor. Those concerns are the limited funds  
7 available from Congress, and the amount of time it would take to  
8 provide a more detailed accounting. And those concerns have  
9 been weighed against the competing need to provide useful  
10 information to the Indian beneficiaries who can actually use it,  
11 and to provide those beneficiaries with this information in a  
12 timely manner.

13 The 2007 accounting plan, Your Honor, has been prepared  
14 with the best interests of the beneficiaries in mind. It is  
15 important to understand that Interior's work over the past years  
16 is designed to prepare an individual statement of account, and  
17 that each individual statement of account will include a  
18 transaction-by-transaction history. These histories will be  
19 stated and set forth in each statement of account.

20 Now also, Your Honor, you will hear that to verify the  
21 accuracy of the transactions that are being accounted for,  
22 Interior's 2007 plan employs valid statistical sampling  
23 techniques. The plan has relied on the skillful analysis  
24 provided by one of the renowned statistical research firms in  
25 the world, and that is the National Opinion Research Center of

1 the University of Chicago, also commonly referred to in this  
2 case as NORC, N-O-R-C. The correctness of that analysis, Your  
3 Honor, will be confirmed during this trial by defendant's  
4 retained expert, Dr. David Lasater.

5 You will also hear testimony and be presented with  
6 evidence about Interior's immensely detailed efforts to examine  
7 more than 100 million individual transactions in the electronic  
8 era. That is in the time period from 1985 to July 2007 in this  
9 case. This work is being done to confirm the reliability of the  
10 data.

11 And, Your Honor, as you requested, the Court will hear  
12 evidence regarding throughput; that is, receipts, interest, and  
13 disbursements. As I noted at our final pretrial conference,  
14 Your Honor, you may recall, issues related to throughput are  
15 difficult to address on an aggregate basis because Interior  
16 normally and historically tracked receipts and disbursements on  
17 an individual basis, on an individual level as they're working  
18 towards the accounting.

19 Despite that, Your Honor, we will present evidence  
20 showing how the original estimate of \$13 billion in total  
21 receipts was estimated. The evidence will demonstrate that the  
22 original estimate of \$13 billion in aggregate receipts from the  
23 period 1909 to 2001 was high, and it was high because it  
24 included amounts that do not constitute individual Indian  
25 monies.



1           You will also hear, Your Honor, evidence regarding  
2   disbursements to the beneficiaries, and the evidence will  
3   demonstrate that Interior properly disbursed Trust funds to  
4   those Indian beneficiaries.

5           And in response to the Court's request, we will present  
6   evidence regarding the estimated cost of performing the  
7   historical accounting for accounts, such as closed accounts that  
8   are currently not included in Interior's 2007 plan, to complete  
9   the historical accounting.

10          Now, in contrast to what we believe the evidence and  
11   testimony will demonstrate, there is evidence on some issues  
12   that will not aid the Court's understanding of Interior's  
13   progress on the historical accounting, and we will not be  
14   presenting such evidence.

15          One such issue is the impossibility of performing  
16   accounting that the plaintiffs believe should be performed.  
17   This hearing is not about the historical accounting that  
18   plaintiffs would prefer; that accounting, which includes  
19   transaction-by-transaction reconciliation, is not required as a  
20   matter of law in this case because of the law of the case. The  
21   Court of Appeals has addressed this issue already.

22          We also expect, Your Honor, as you hear the evidence  
23   and review the administrative record, you will see that  
24   Plaintiffs' related claims of unreliable data cannot undermine  
25   Interior's historical accounting work. Interior's work in

1 retrieving and organizing millions of documents that are needed  
2 for the historical accounting has revealed a very high level of  
3 redundancy in the system. That redundancy, Your Honor, will be  
4 explained to you at this hearing, and throughout the hearing as  
5 you hear testimony and view documents.

6 You will also hear evidence, Your Honor, explaining  
7 that the existence of so many documents permits reasoned,  
8 logical inferences regarding any gaps that may exist in the  
9 physical collection of documents to effectively fill those gaps.  
10 For these reasons, Your Honor, any outdated evidence about the  
11 loss of a particular document or documents really proves nothing  
12 and is not material to Interior's work.

13 Plaintiffs would have to prove not only that no copies  
14 of a single document exist, but also that there were no  
15 alternative documents with similar information, and that there  
16 was no other means, such as using inferences, to uncover the  
17 information.

18 In sum, the evidence you will hear, Your Honor, will  
19 demonstrate that reliable documents exist, and have been  
20 collected to perform the historical accounting.

21 Quickly, Your Honor, the law of the case also dictates  
22 that evidence or testimony on some other issues will not be  
23 presented and should not be considered here. Issues that such  
24 evidence relates to are asset management, or IT security.  
25 Either this Court or the Court of Appeals have already addressed

1 these issues, and we will not be presenting evidence or  
2 testimony on those because of those earlier rulings.

3 Now, that leaves us, Your Honor, with the nub of the  
4 case: Interior's work in performing the historical accounting,  
5 what it's done and how it's been doing it, as you have phrased  
6 it generally. And in that regard, Your Honor, Interior has  
7 performed an enormous amount of work on historical accounting  
8 since 2003. And throughout the hearing, that work will be  
9 described in detail and also summarized for you so that you will  
10 have a better understanding not only generally of what was done,  
11 but in some instances in great detail so you can understand the  
12 level of effort that has gone into this work.

13 Now, an important first step in this effort, Your  
14 Honor, was a collection of documents related to 37 accounts of  
15 the named plaintiffs in this case, and selected predecessors,  
16 and then the analysis of that document collection by Ernst &  
17 Young.

18 This work commenced back in 1999, and it was addressed  
19 in the Phase 1.5 trial. I point it out to you here because it's  
20 relevant, and to let you know that for example we have  
21 designated the testimony of Joseph Rosenbaum and Robert Brunner  
22 that already covers this issue. But you will see reference to  
23 this work in the administrative record, and you very likely will  
24 hear reference to it during the course of this hearing.

25 The results of this work demonstrated that there are

1 sufficient documents to list the receipts and disbursements for  
2 the named plaintiffs and those chosen predecessors. This  
3 process, this work, is known as Paragraph 19 work. It cost over  
4 \$20 million and took approximately two years to complete. It  
5 resulted in the collection of over 160,000 documents, and for  
6 this effort the earliest documents that were collected were from  
7 1914.

8 It's important to understand, Your Honor, that it is  
9 not representative of the accounting work that is being  
10 performed pursuant to the 2007 plan to complete the historical  
11 accounting. But it is also important to understand that at the  
12 time it did demonstrate that documents necessary to perform a  
13 historical accounting actually existed and could be retrieved.

14 Now, as I said, a team from Ernst & Young examined the  
15 Paragraph 19 documents after they were collected and concluded  
16 that there was sufficient contemporaneous evidence for  
17 86 percent of the transactions to be reconciled. Those  
18 transactions represented 93 percent of the dollar value of all  
19 of the transactions that were analyzed.

20 Now, an important point to understand, and you will  
21 hear testimony about this, Your Honor, an important point to  
22 understand here is that the fact that contemporaneous documents  
23 were not found for some of the transactions does not mean that  
24 the transactions were in error or were wrong. It simply means  
25 that documents at that time could not be found for the

1 transactions.

2 But significantly, what the work did show was there was  
3 no evidence of transactions that were not recorded in the IIM  
4 account ledgers, in the large ledgers that were reviewed, except  
5 for one collection amount of \$60.94. And that collection was  
6 wrongly credited to another beneficiary whose account number was  
7 very similar.

8 There were some errors observed during this work, Your  
9 Honor, greater than \$1, but those differences came to only  
10 \$3,500 in overpayments, and nearly \$250 in underpayments.

11 Now, based on the large amount of transactions that  
12 were reviewed, that came to a combined difference rate of  
13 0.4 percent. And significantly, it came to an underpayment  
14 dollar difference of less than 0.2 percent of the dollars that  
15 were actually reconciled.

16 Now, as you are aware, Your Honor, subsequently the  
17 Department of the Interior on January 6th, 2003 submitted its  
18 plan to perform a historical accounting in response to the order  
19 of Judge Lamberth. The plan was made based on the best  
20 estimates that Interior could make at the time, based on the  
21 best information available to it at that time.

22 At the time, Interior was still learning about the  
23 amount of documents that were available to it to conduct the  
24 historical accounting, and it was still learning about the  
25 quality of the information within those documents. Interior did

1 not have information regarding, or at least did not have much  
2 information regarding the cost involved in collecting the  
3 documents, and in organizing them in a manner that they could be  
4 effectively used in performing the historical accounting.

5 And significantly, Your Honor, Interior did not know  
6 what future level of funding it would receive from Congress.

7 However, what Interior did know, Your Honor, was that  
8 by 2002 Congress had already rejected the idea of paying for an  
9 accounting based on a complete transaction-by-transaction  
10 reconciliation. This was a result of Interior's 2002 report to  
11 Congress and the Congressional response to that report. Even  
12 then, Your Honor, Interior knew that it would have to strike a  
13 balance between the cost and time it could take to perform the  
14 historical accounting and the need to provide useful information  
15 to the beneficiaries as quickly as possible so that they could  
16 use this information.

17 Interior's 2003 plan, therefore, Your Honor, included  
18 the use of statistical sampling to assess the reliability of the  
19 transaction data that it would be analyzing to prepare the  
20 historical statements of account.

21 The evidence that you will see in the coming days and  
22 weeks will show that statistical sampling is a scientifically  
23 grounded discipline whereby a person can select items from  
24 within a population, and based upon an analysis of a relatively  
25 small portion of that population, make reasoned and highly

1 confident estimates about the total population. And of course,  
2 in this case that technique is used related to transactions,  
3 Your Honor.

4 Because of its limited knowledge regarding the  
5 documents and what it may find back in 2003, Your Honor,  
6 Interior initially planned to use extremely large samples  
7 because of highly conservative assumptions made regarding the  
8 amount of the documents that could be found and the error rates  
9 that would be witnessed within those documents.

10 Now, from fiscal year 2003 through fiscal year 2006,  
11 Interior sought funding for the historical accounting work in  
12 the amount of approximately \$390 million. This amount was to  
13 conduct accountings for both IIM and tribal accounts, Your  
14 Honor.

15 Despite Interior's request, Congress appropriated only  
16 \$174 million during this period for both the IIM Trust and the  
17 tribal Trust. This information is summarized in the chart on  
18 the screen. It is DX-102. This chart demonstrates the  
19 breakdown between Interior's budget request, and the resulting  
20 appropriations can be seen in this chart, in the middle column.

21 Now, notwithstanding the litigation that eventually  
22 surrounded the two broad structural injunctions that were issued  
23 by Judge Lamberth, and despite the limited funding from  
24 Congress, Interior continued with its work to the historical  
25 accounting throughout this time period, Your Honor. Since 2003,

1 Interior and its contractors have accomplished an enormous  
2 amount of work related to the historical accounting.

3 Thus, for example, you will be hearing about the  
4 following in the coming days and weeks: Over the past  
5 four years, Interior has spent approximately \$127.1 million  
6 performing work on the IIM historical accounting alone.

7 Also, as you're aware, Your Honor, in 2004 Interior  
8 opened the American Indian Records Repository, or the AIRR, in  
9 Lenexa, Kansas. It has been consolidating Indian records within  
10 that facility ever since. It is a state-of-the-art,  
11 climate-controlled facility that secures Indian records,  
12 including those that are being used in the historical  
13 accounting.

14 Interior is also continually indexing documents --  
15 indexing boxes of documents as they are collected. And then,  
16 after it has collected these documents, imaging and coding the  
17 relevant documents within the AIRR so that they will be  
18 searchable as part of the historical accounting work. Interior  
19 has indexed more than 155,000 boxes of Indian records,  
20 comprising over 300 million pages.

21 Now, the subsequent coding process will be explained to  
22 you, Your Honor. And what it will show is that the information  
23 is then captured from these relevant documents and identifying  
24 information is taken from them, such as an IIM account number,  
25 the amount of the transaction or the type of transaction, or any



1 other identifying information that can assist Interior and its  
2 contractors in performing the work.

3 The document is then imaged, and this information is  
4 then electronically retrievable in a database called the ART, or  
5 the Account Reconciliation Tool, and you will hear testimony  
6 about that tool, Your Honor, throughout the course of the trial.

7 The ART is then used to, among other thing, reconcile  
8 transactions as part of the historical accounting work. As of  
9 June 30th of this year, Your Honor, the ART contained  
10 approximately 9.7 million coded IIM images and 8.7 million coded  
11 tribal images, for a total of 18.4 million images.

12 A site visit, Your Honor, to Lenexa will demonstrate  
13 not only the large amount of documents that are collected, but  
14 also the staff and systems that turn these boxes of documents  
15 into digitized images that are used for the historical  
16 accounting work.

17 Now, Your Honor, significantly, Interior has reconciled  
18 83,711 judgment and per capita accounts as of March 31st of this  
19 year, and this represents approximately 86 percent of those  
20 accounts. Each of these accounts was reconciled through a  
21 transaction-by-transaction approach. The chart on the screen,  
22 Your Honor, addresses the judgment accounts, and it also  
23 includes summary information related to the Paragraph 19 work  
24 that I addressed earlier.

25 Judgment accounts contain funds that a tribe may pass

1 along when it receives money as part of the legal judgment or as  
2 a settlement. More than 66,000 judgment accounts have been  
3 reconciled by Interior.

4 Per capita accounts, Your Honor, contain payments  
5 distributed by tribes to individual members of the tribe after  
6 the tribe has received income. More than 17,500 per capita  
7 accounts have been reconciled. Interior is ready to prepare  
8 historical statements of account for mailing for those judgment  
9 and per capita accounts within the 83,711 that have not yet been  
10 mailed.

11 As the Court is aware, many of these HSAs are before  
12 the Court now, and the information contained within them should  
13 now be provided to the beneficiaries because it should help the  
14 beneficiaries, it will help the beneficiaries, and they should  
15 have it.

16 Your Honor, you will also hear evidence regarding the  
17 fact that in fiscal year 2004, appropriation language was  
18 drafted by Congress that specifically allowed Interior to  
19 perform litigation support work. Interior began that work  
20 initially in support of congressionally directed settlement  
21 talks.

22 Interior, through what became known then as a  
23 litigation support accounting project, or the LSA project,  
24 reconciled over 6,500 transactions in land-based accounts for  
25 the electronic era. That is, reconciled over 6,500 transaction

1 land-based accounts ranging from 1985 to 2000.

2 The LSA project reconciled more than 99 percent of the  
3 sample land-based IIM account transactions. Interior determined  
4 that less than one percent, Your Honor, less than one percent of  
5 those reconciled transactions had differences; and the amount of  
6 dollars in error, Your Honor, were very small.

7 The LSA project reconciled 2,099 large-dollar  
8 transactions. That is, Your Honor, transactions that were equal  
9 to or greater than \$100,000. Information regarding that work is  
10 summarized in the chart on the screen. That reconciliation  
11 involved \$483 million in total.

12 The LSA project also reconciled the statistically valid  
13 sample of smaller accounts, approximately 4,500 smaller value  
14 transactions; that is, transactions less than \$100,000 in value.  
15 And the results of that are set forth on the screen.

16 Now, Your Honor, Interior learned a very important  
17 lesson from this project, and that is the fact that using  
18 smaller but statistically valid samples of transactions could  
19 still provide a high degree of confidence in the results of the  
20 work when compared with the transaction-by-transaction  
21 reconciliation.

22 It also demonstrated that Interior's initial  
23 assumptions back in 2003, about the error rates and missing  
24 documentation, proved to be wrong. As noted, Your Honor, few  
25 errors were found and much documentation actually existed and

1 could be collected and effectively used by Interior and its  
2 contractors.

3 Beyond this reconciliation work, Your Honor, you will  
4 hear testimony about Interior's work through Michelle Herman and  
5 others at FTI in performing an extremely significant data  
6 completeness validation project. The DCV project constitutes a  
7 massive ongoing effort, and this effort is to assess the  
8 reliability of the electronic data and to identify and resolve  
9 gaps within that data.

10 FTI has so far examined over 100 million individual  
11 transactions dating back to at least February 1985, and  
12 including transactions up to, Your Honor, July 2007. To date,  
13 the DCV project has revealed the reliability of the  
14 documentation, and also the regularity of Interior's processes.  
15 And this will be addressed by Ms. Herman during her testimony.  
16 She is, Your Honor, scheduled to be our third witness in this  
17 proceeding.

18 Interior is now also beginning to prepare, Your Honor,  
19 historical statements of accounts for the more complicated  
20 land-based accounts in the electronic era. These -- and a  
21 sample first page, redacted so that it could be shown in Court.  
22 A sample is on the screen. These HSAs will provide to each IIM  
23 account holder covered by the Act the following information:

24 Information on how much money was credited to their  
25 account; the amount of interest credited to their account; the

1 disbursements that were made from their account; and references  
2 to each transaction as those references are available. Examples  
3 of these HSAs, Your Honor, are trial exhibits, and will be  
4 explained to the Court throughout the hearing.

5 Now, based on this information as I've related it to  
6 Your Honor briefly this morning, Interior's 2007 plan to  
7 complete the historical accounting is rational. It is based on  
8 that information, it is based on the work completed, it is based  
9 on the lessons learned, it is based on the funding history that  
10 Interior now has in working with Congress, and it is based on  
11 the compelling results of the statistical analysis performed by  
12 Interior's contractors.

13 The Court of Appeals has prescribed a deferential  
14 standard of review, Your Honor, regarding a look at and an  
15 analysis of Cobell's 2007 plan. In Cobell VI, the Court of  
16 Appeals directed that "Defendants should be afforded sufficient  
17 discretion in determining the precise route they take." And  
18 more recently, Your Honor, as you're aware, the appellate Court  
19 also has stressed that Interior's historical accounting plan is  
20 entitled to substantial deference. Interior's 2007 plan to  
21 complete the historical accounting work clearly satisfies that  
22 standard of review.

23 The evidence will demonstrate, Your Honor, that  
24 Interior has weighed the competing interests of cost and time  
25 versus the need to provide useful information to Indian

1 beneficiaries, and to do so in a timely manner. And its  
2 determinations based on that are rational. In this regard, too,  
3 Your Honor, you will hear evidence generally regarding the cost  
4 of performing the accounting for accounts closed prior to  
5 October 25th, 1994, and why it is reasonable to consider those  
6 costs as a factor in determining the scope of the historical  
7 accounting.

8 The evidence and testimony we present will demonstrate  
9 that it could cost between approximately 2.3 and 2.6 billion  
10 dollars to perform a historical accounting for all IIM accounts  
11 between 1938 and 2006.

12 THE COURT: 2.3 and 2.6 billion, did you say?

13 MR. KIRSCHMAN: Yes. Your Honor, it's important to  
14 note that this do not include direct pay accounts, because those  
15 funds do not pass through the IIM system.

16 In light of the above, Congress's funding history on  
17 this project is relevant to the plan put forth by Interior. As  
18 stated in the historical accounting project document itself,  
19 that was filed earlier with the Court, for fiscal years 2004,  
20 2005, and 2006 the President's budget requested a total of  
21 nearly \$400 million for historical accounting, but Congress  
22 appropriated only about \$170 million. And I mentioned that  
23 before, Your Honor. And this amount is for both tribal and IIM  
24 accounts.

25 The 2007 plan rightly takes into consideration this

1 funding history. Because this very costly accounting is funded  
2 entirely at taxpayers' expense, and with limited appropriations,  
3 Interior has proceeded prudently and in close coordination with  
4 Congress.

5 Your Honor, it is also important to understand the  
6 nature of the transactions being reviewed here, and throughout  
7 the trial you will hear evidence regarding this. Experience has  
8 now shown that the cost to reconcile a single transaction  
9 averages between 3,000 and 3,500 dollars, depending on the  
10 number of documents needed to reconcile the individual  
11 transaction. A lot of expensive, time-consuming work is being  
12 spent to account for relatively small amounts of money.

13 For example, Your Honor, the great majority of the  
14 transactions from 1985 through 2000 involve very small amounts  
15 of money. The chart on the screen, Your Honor, was a trial  
16 exhibit in the Phase I.5 trial, and it is now a Plaintiffs'  
17 exhibit in this upcoming trial.

18 It demonstrates that approximately 41 million of the  
19 credit transactions during this period are worth \$10 or less,  
20 and that is depicted on the left-hand side of this chart.

21 Approximately 93 percent of the credit transactions are  
22 worth less than \$100, and these transactions represent only a  
23 little more than six percent of the credit throughput for this  
24 time period, for the period 1985 to 2000.

25 In sharp contrast, Your Honor, transactions of \$100,000

1 or more represent only approximately .02 percent of the number  
2 of transactions. And this is demonstrated on the far right-hand  
3 side of this chart, in the bottom right-hand corner. Despite  
4 constituting only .02 percent of the number of transactions,  
5 they also constitute approximately over 41 percent of the dollar  
6 value of all of the transactions. You will, during the course  
7 of this hearing, hear testimony on this and see charts that have  
8 a little more recent information, but don't change these  
9 percentages significantly at all, Your Honor.

10 Now, use of statistical sampling continues in the  
11 current 2007 plan. The evidence and testimony you will hear  
12 will also show that, based on the results of the LSA work,  
13 Interior can make highly confident statements about the entire  
14 electronic era population. The plan rationally relies on the  
15 statistical sampling results, and this will be demonstrated to  
16 you through the trial.

17 The 2007 plan to complete the historical accounting  
18 also addresses the paper era. That is, Your Honor, the period  
19 of time earlier than approximately 1985. The evidence will show  
20 that Interior contemplates, as an initial step, sampling from  
21 the paper era to assess whether the population in the paper era  
22 differs from the population in the electronic era. If the  
23 results show no differences, it will be statistically valid,  
24 then, to apply the LSA results to the paper era, and you will  
25 hear evidence of that.



1           It is certainly possible that there will be no such  
2 differences because, Your Honor, the only real difference that  
3 we are aware of now -- the only differences in the two eras is  
4 in the means of bookkeeping. The thing that changes, that we  
5 went from paper records to electronic records.

6           If the results do show differences between the two eras  
7 as the work is performed, the 2007 plan provides for further  
8 sampling and a reassessment of how to approach the paper era.  
9 That is entirely reasonable, and will be addressed.

10          Your Honor, in light of the Congressional funding  
11 received by Interior, the amount of work it has performed that I  
12 just summarized here quickly, and the incorporation of rational  
13 lessons learned into a plan for completing the historical  
14 accounting, there's no support for a claim that Interior  
15 Defendants were, and its planning to complete the accounting  
16 somehow constitutes steps so defective, as described by the  
17 Court of Appeals, that they will lead to further delay.

18          Instead, what you will see during the course of this  
19 trial is a reasoned exercise of the Secretary's discretion to  
20 complete the work and to meet Interior Defendant's fiduciary  
21 requirements.

22          Your Honor, as I mentioned, defendants will also  
23 address issues related to throughput. As you will see, both the  
24 of the IIM funds and the historical accounting were designed on  
25 an individual basis rather than often on an aggregate level.

1 Therefore, much of the evidence you will hear on these issues  
2 will provide estimates, but not always hard figures based on  
3 aggregate yearly numbers. Those aggregate yearly numbers do not  
4 always exist.

5 The evidence will show, though, that the source of the  
6 original estimate that the aggregate receipts for the throughput  
7 was \$13 billion. Based on what historical evidence could be  
8 found, a rough estimate of \$3 billion in receipts from 1909 to  
9 1971 was made. Then, using historical documents that often  
10 provided year-end balances, an estimate of 9.9 billion in  
11 receipts from 1972 to 2001 was made.

12 Your Honor, these estimates were summarized in a 2002  
13 chart that was presented to Congress, and that is now appearing  
14 on your screen.

15 Your Honor, you will also hear evidence explaining that  
16 this \$13 billion figure was high because it contained amounts  
17 that do not constitute funds of individual Indians in the IIM  
18 accounts. One example, Your Honor, is the tribal monies that  
19 were placed in IIM accounts at the request of tribes, but that  
20 were not really part of individual accounts. You will hear,  
21 Your Honor, that when tribal monies are properly removed, the  
22 aggregate throughput number is lowered to approximately  
23 \$11.7 billion.

24 Another example of funds that should not have been part  
25 of the 13 billion involved situations in which the same dollar

1 may have been counted twice, Your Honor. For example: When the  
2 dollar was received into a special deposit account initially,  
3 and then was again counted when that same dollar was transferred  
4 from the SDA, from the Special Deposit Account, into an  
5 individual Indian's IIM account.

6 Beyond that, Your Honor, during the course of this  
7 hearing you will also hear evidence regarding the disbursement  
8 of IIM funds. We will offer evidence demonstrating the flow of  
9 disbursement information, specifically back to 1991. The  
10 evidence will show that, of the amounts Interior disbursed by  
11 check from 1991 to 2005, less than one percent of the checks  
12 issued -- less than one percent of the checks issued were not  
13 cashed. These un-cashed checks represent an even smaller  
14 percentage of the total dollar amount of the checks issued.

15 The evidence will show, Your Honor, that from 1991  
16 through 2005, approximately 6.6 million checks were issued, with  
17 a value of approximately \$2.8 billion. Of those, Your Honor,  
18 there were only approximately 46,000 un-cashed checks, with a  
19 value of again approximately \$5.2 million.

20 The evidence will also set forth, as the hearing  
21 progresses, the process by which those un-cashed checks are  
22 accounted for and addressed by the Department of the Interior.

23 Your Honor, regarding the disbursements you will also  
24 hear evidence regarding the mass cancellation of checks that was  
25 required government-wide in 1987 by Congress.

1           The evidence will show that the 1987 legislation  
2   required the Department of the Treasury to cancel 10 million  
3   government checks issued throughout the government - ergo, the  
4   term "mass cancellation" - and that these checks were issued  
5   between approximately 1954 and 1989. You will hear that this  
6   amount included approximately 40,000 IIM checks, with a face  
7   value of only, Your Honor, \$1.9 million.

8           You will also hear that Interior was able to determine  
9   that it had actually voided over \$300,000 worth of those checks.  
10   That lowered the total value of the un-cashed checks to only  
11   1.6 million for that entire 35-year period.

12           The evidence will also show that by comparison, the  
13   Department of the Interior issued checks to IIM account holders  
14   worth \$1.6 million during just one week in 1989.

15           Your Honor, the evidence will further show that, in  
16   tracing thousands of these checks to specific IIM accounts,  
17   Interior worked towards and was actually able to restore almost  
18   \$300,000 to beneficiaries' accounts.

19           And finally, Your Honor, we will provide testimony that  
20   Interior continues to maintain a fund to reimburse individuals  
21   who may yet seek payment of one of those canceled checks, or  
22   should the Department of the Interior receive further  
23   information related to them.

24           Now, with all this in mind, Your Honor, Plaintiffs bear  
25   the burden of demonstrating that Interior's work has constituted

1 steps so defective that it has further delayed the historical  
2 accounting since 2001. Although this might not be considered an  
3 ordinary APA case, the APA is the appropriate basis to review  
4 Interior's progress on the historical accounting.

5 It is also now well established that plaintiffs at this  
6 trial bear the burden of proving flaws or defects in Interior's  
7 work that are further delaying the accounting. The Court of  
8 Appeals has addressed this issue.

9 However, Your Honor, the evidence will show that the  
10 dedicated, rational efforts of such individuals as James Cason,  
11 who, Your Honor, will be our first witness, Katherine Ramirez,  
12 who will be our second witness, Abe Haspel, Michelle Herman, and  
13 the team at NORC, the work of all these individuals and many  
14 more, have not further delayed the historical accounting since  
15 2001.

16 Plaintiffs' case cannot distract from the testimony and  
17 evidence that you will hear, including also significantly, Your  
18 Honor, the documents that are already in the administrative  
19 record. This information, this testimony and this evidence,  
20 will demonstrate that Interior has accomplished and is intending  
21 to reasonably achieve in the future, work that is consistent  
22 with the 2007 plan and prior decisions of the Court.

23 In summary, Your Honor, based on the information that  
24 Defendants have presented in the administrative record and that  
25 we will present at this trial, the Court should find that the

1 Department of the Interior is now complying with its fiduciary  
2 duties under the 1994 Act. In no sense, Your Honor, have  
3 defendants taken steps so defective that they would necessarily  
4 delay rather than accelerate the ultimate provision of an  
5 adequate accounting.

6 Thus, Your Honor, at the conclusion of this evidentiary  
7 hearing, the Court should find the historical accounting being  
8 performed in accordance with the 2007 plan are sufficient as a  
9 matter of law. We will request that the matter be remanded to  
10 the Department of the Interior, to carry out its historical  
11 accounting plan without further interruption.

12 Thank you, Your Honor. We appreciate your  
13 consideration of this matter.

14 THE COURT: Thank you, Mr. Kirschman.

15 Mr. Gingold?

16 MR. GINGOLD: Good morning, Your Honor.

17 THE COURT: Good morning.

18 MR. GINGOLD: Your Honor, thank you very much. On  
19 behalf of 500,000 current Individual Indian Trust beneficiaries  
20 and an extremely dedicated litigation team, we thank you very  
21 much for the time this Court has spent in the short period that  
22 it has had available to prepare for this proceeding, which this  
23 Court noted has been a long time coming. And we thank you very  
24 much for that. And this courthouse -- this Court, the District  
25 Court, is one of the few sanctuaries that our clients have found

1 in 120 years. So we thank you very much for that.

2 There are three things that I agree with what  
3 Mr. Kirschman said this morning. One is, the government filed  
4 the July 2, 2000 plan; is the other is, the government filed  
5 their July 6th, 2000 plan; the other is, what they've been doing  
6 is a litigation support accounting plan, and they are estimating  
7 and projecting probabilities as to what might have occurred in  
8 certain accounts. Other than that, Your Honor, I disagree  
9 completely with what was represented to you this morning.

10 The reality is, the litigation support accounting plan  
11 is a plan based on documentation in the administrative record  
12 that is designed for one purpose: To limit the liability of the  
13 United States government. That's why it is called the  
14 Litigation Support Accounting plan; that is what is being done.  
15 It is not an accounting that has been declared by this Court, it  
16 is not an accounting duty that the United States government has  
17 owed our clients since the government first exercised control  
18 over our clients' Trust lands, the natural resources, and the  
19 funds and proceeds generated therefrom.

20 The United States Supreme Court, in Mitchell II has  
21 determined the Trust duties of the United States government,  
22 specifically with request to the Individual Indian Trust, in  
23 1983. Whereas here, the government has exercised control, and  
24 continues to exercise control, all traditional Trust principles  
25 apply to the government's management of the Trust.

1           Therefore, with all due respect to Mr. Kirschman, this  
2   is not an APA case. We understand the tension in the Court of  
3   Appeals opinions. How those tensions are ultimately explained,  
4   Your Honor, I think is anyone's guess at this point in time.  
5   But what is abundantly clear is this is not an ordinary  
6   Administrative Procedure Act case, this is not an ordinary Trust  
7   case. Your Honor, this is not an ordinary Trust.

8           When the United States government established this  
9   Trust, it did not settle the Trust, notwithstanding what our  
10  august colleague has suggested. The lands were not lands owned  
11  by the United States. The resources were not resources owned by  
12  the United States. The lands were principally held by the  
13  tribes on reservations pursuant to treaties that went back  
14  decades before the Trust was established in 1887.

15           What happened with regard to the Allotment Act, Your  
16  Honor, which was the General Allotment Act of 1887, was that the  
17  reservations were broken up. Approximately 40 percent of the  
18  land owned by the tribes was reserved for the tribes in Trust.  
19  40 percent was reserved for the individuals. This is all west  
20  of the Mississippi. And another 20 percent was available for  
21  whatever the United States government wanted to do, whether it  
22  wanted to provide the land to homesteaders for various companies  
23  that were developing the large cities out west, for railroads,  
24  or anything else.

25           So Your Honor, this Trust was not settled by the United



1 States government. The land was contributed to the Trust, which  
2 was owned legally by the Indians. The money that was generated  
3 from those lands were monies of the Indians. The Trust duties  
4 are duties that are established in accordance with Trust law.

5 Congress established the Trust; it did not settle the  
6 Trust. The United States government is the trustee; the  
7 Interior Department is not. The Secretary of the Interior and  
8 the Assistant Secretary of Indian Affairs are among the trustee  
9 delegates who have been charged with the fiduciary duty to  
10 manage the Trust in accordance with Trust law. The Secretary of  
11 the Treasury is another trustee delegate.

12 What this Court has held, and what the Court of Appeals  
13 has affirmed, is that there is a fiduciary duty that preexisted  
14 the 1994 Trust Reform Act. And again, that duty, in accordance  
15 with Mitchell II, began at the time the government exercised  
16 control of the lands. The exercise of control was decided by  
17 the Supreme Court in two principal ways: Whether it's by  
18 statute and regulation; or, in the absence of statute, by  
19 practice.

20 The practice element was determined in 2003 in the  
21 United States Supreme Court case involving the White Mountain  
22 Apache Tribe. The government contested both the Mitchell II  
23 decision, and it contested the White Mountain Apache, and the  
24 government lost in both. The government took the position  
25 that duties -- this was a bare Trust, not a true Trust. The

1 duties did not apply.

2 In reality, the Supreme Court said no, that's not true.  
3 The duties do apply. And unless Congress specifically to the  
4 contrary limited those duties, they applied as they would apply  
5 in traditional Trust law.

6 Your Honor, statutes were enacted subsequent to 1887:  
7 In 1889, statutes were enacted with regard to the duty to  
8 account for proceeds of leased lands. You had statutes in the  
9 mid-1890s; you had statutes in 1910; and you had statutes again,  
10 beginning in 1918; and the 1938 statute, Your Honor, amended the  
11 1918 statute. The 1994 statute amended the 1938 statute.

12 The statutes weren't repealed; they were superseded and  
13 expanded for the purpose of enforcing the Trust duties of the  
14 United States, not limiting or reducing in any way the Trust  
15 duties of the United States.

16 In 1918 there were several statutes in existence with  
17 regard to forestry, oil and gas, grazing. Regulations were  
18 promulgated by the Department of Interior with regard to this  
19 sort of management. Even the United States Forest Service,  
20 which was not part of the United States Department of Interior,  
21 was involved with regard to the management of these Trust lands,  
22 specifically with regard to the sale of timber.

23 And Your Honor, even from the beginning of the Trust,  
24 concerns were expressed by Congress about the lack of control,  
25 about the corruption. As a matter of fact, at the turn of the

1 20th century, \$700,000 was at issue, and an investigation was  
2 conducted. Of course, there were no results.

3 I think it was in 1908, Your Honor, that Theodore  
4 Roosevelt executed the largest timber contract in the history of  
5 the United States at that point in time involving Indian timber  
6 lands. The largest in the history of United States. We're not  
7 talking about peanuts, we're not talking about \$13 billion,  
8 we're not talking about 10-dollar accounts, Your Honor. We're  
9 talking about some of the most valuable resources in the United  
10 States for 120 years.

11 The allotments were made before the General Allotment  
12 Act or the Dawes Act in 1887. The government's own records and  
13 the administrative record demonstrate allotments were made at  
14 least as early as the 1850s. And they were pursuant to treaty,  
15 Your Honor; and again, some of those lands are leased and some  
16 are not.

17 So we're dealing with a comprehensive federal scheme  
18 with regard to the management and regulation of the Individual  
19 Indian Trust lands, the beneficial interests solely in the hands  
20 of the individual Indians, not the United States government.  
21 The United States government took the legal title. It didn't  
22 have the legal title to give to anyone.

23 So we have an entirely different situation. And one of  
24 the myths that has been propagated by the government, including  
25 in representations to the Court of Appeals, is one of the

1 reasons that this Trust doesn't have to be managed nearly so  
2 well as anyone else's Trust, is because Indians aren't paying  
3 for it. This is free; therefore, whatever Congress  
4 appropriates, that's all it can do, and the nature and scope of  
5 the Trust duties is limited by whatever an appropriations act is  
6 going to provide.

7 Your Honor, that is fundamentally untrue. From the  
8 very beginning of this Trust, fees have been charged for the  
9 management of the Trust lands; eight to 10 percent with regard  
10 to the sale of timber. Your Honor, if you had a trust today in  
11 the Wilmington Trust Company, whether you're a Dupont or anybody  
12 else, you're not paying eight percent, you're not paying  
13 10 percent. You're paying a management fee of never more than  
14 three percent, and probably less, depending on the size of the  
15 trust.

16 So our clients have not only been paying for the  
17 management of the Trust, they've been paying for the management  
18 of their Trust more than any other citizen in this country has  
19 ever paid for the management of the Trust. This is not a free  
20 Trust. What we're looking at is an abuse that has gone on for  
21 120 years, and we're hoping this is the beginning of the end of  
22 that abuse.

23 Therefore, Your Honor, coupled with the complete  
24 exercise and control of our clients' Trust lands, the fact that  
25 they have been paying dearly for the management of their Trust,

1 there is absolutely no excuse why the fiduciary duty to account  
2 that was declared by this Court, affirmed by the Court of  
3 Appeals, and has existed with respect to our clients for nearly  
4 120 years, should not finally be discharged.

5 It is not, Your Honor -- in fact, the 2007 plan is a  
6 repudiation of the declaratory judgment of this Court on  
7 December 21st, 1999. There's a repudiation of the declaratory  
8 judgment affirmed and refined by the Court of Appeals on  
9 February 23rd, 2001. None of the subsequent Court of Appeals  
10 decisions purport to limit the nature of the declared accounting  
11 duty.

12 What the cases do, in an attempt to reconcile how they  
13 relate to this Court's original declaratory judgment and  
14 Cobell VI on February 23rd, 2001, is that this Court cannot tell  
15 the government precisely how to do the accounting of all funds  
16 for every single Individual Indian Trust beneficiary, and  
17 establish accurate account balances.

18 But, if what the government isn't doing will result in  
19 that, this Court doesn't have to sit back and let it happen.  
20 This judiciary itself is a trustee with regard to the Trust. It  
21 is the United States government. And there is nowhere in any of  
22 the opinions, in whatever dicta, that says that there is no duty  
23 to account to each Trust beneficiary for all funds, that there  
24 is no duty to account and establish accurate account balances.

25 As a matter of fact, in Cobell VI it was explicit:

1 Where the government's expert Dr. Lasater, who Mr. Kirschman  
2 indicated will be testifying again, indicated in that particular  
3 plan they were doing a statistical sampling based on the  
4 variable sampling; not attribute, not adapted, but variable. It  
5 has its on characteristics.

6 And Dr. Lasater testified in a hearing before this  
7 Court on November 23rd and November 24, 1998 that they could not  
8 establish accurate account balances unless they began with the  
9 opening balance of the account. Cobell VI confirmed it. How is  
10 it possible, the Court asked, to do the accounting and establish  
11 accurate balances without examining and reconciling the opening  
12 balance?

13 That is not being done here, Your Honor. And as a  
14 matter of fact, if you're looking at what the accounting, the  
15 Litigation Support Accounting plan, is doing, it's excluding the  
16 vast majority of the beneficiaries. Not some, but the majority  
17 of the beneficiaries, the beneficiaries whose accounts were not  
18 reflected on the system as open on October 25th, 1994.

19 Your Honor, one of the interesting admissions in the  
20 administrative record is a document that states that trying to  
21 determine the number of accounts and the history of the Trust is  
22 entirely speculative. Your Honor, in order to determine whether  
23 or not each Trust beneficiary is being provided an accounting of  
24 his or her funds, we also have to know how many accounts exist.

25 From the beginning of the Trust, from the beginning of

1 time, the government exercised control. When the '94 Act was  
2 enacted, again it was enacted to give authority to the special  
3 trustee because Congress was not satisfied with the Secretary's  
4 discharge of the Trust duty after years of hearings and  
5 difficulties.

6 So it required a special trustee; not Mr. Cason. It  
7 required the special trustee to assure that the account balances  
8 are accurate. There's language in the Act, Your Honor, I think  
9 it's Section 3 of the Act. Mr. Cason is not the special  
10 trustee; Mr. Swimmer is the special trustee. Mr. Swimmer, Ross  
11 Swimmer, special trustee for American Indians. Mr. Swimmer is  
12 also the former assistant Secretary of the Interior, Indian  
13 Affairs, in the 1980s. Mr. Cason, in the 1980s, Your Honor, was  
14 the deputy to Steven Griles when Steven Griles was the assistant  
15 Secretary for Minerals Management.

16 So both Mr. Cason and Mr. Swimmer were around at the  
17 period of time when Congress was involved in heated discussions  
18 about the Trust. And in fact, in a 1989 report of the special  
19 committee for investigations by the Senate Committee of Indian  
20 Affairs, they found pervasive fraud and corruption at the  
21 Department of Interior with regard to the Indian oil programs.

22 Your Honor, that corruption was identified in 1989; it  
23 was identified in documents in 1928; it was identified by  
24 Congress in the predecessor to the Brookings Institution;  
25 reports of 1915; reports at the turn of the century. And during

1 the deposition of Mr. Cason that I took in preparation for one  
2 of our many trials, Your Honor, I asked Mr. Cason if there was  
3 any investigation for fraud that was found. And Mr. Cason said  
4 he wasn't aware of any fraud that was found in the first place,  
5 and therefore he wasn't aware of any investigation that was  
6 conducted.

7 Your Honor, the systems that house our clients' Trust  
8 assets and money have been without control. There's no  
9 management. All of this, by the way, is in the administrative  
10 record. The data is not only unreliable; it's been repeatedly  
11 stated as unreliable by every single independent certified  
12 public accountant that has looked at the information. There was  
13 not even an audit of the Trust for the first 100 years of the  
14 Trust.

15 And the auditor, which was Arthur Andersen, explicitly  
16 said they could not render an opinion because the systems were  
17 so poor, the controls were so bad, the staffing was so  
18 inadequate, that there was no way to render an accurate  
19 assessment of whatever was going on in the Trust.

20 That was a 1990 report, Your Honor, and it covered  
21 FY 1986 and '87, I believe, or it was '87 and '88. And the  
22 auditor itself said, this is the first audit of the Trust in  
23 100 years.

24 So Your Honor, you've had a trust operating for  
25 100 years, and the government would like you to suspend belief



1 that notwithstanding the absence of controls and adequate  
2 management, everything was just right and there isn't even a  
3 one-percent error.

4 Let me give you an example of why -- there's a certain  
5 amount of perverse humor in this, Your Honor. We've been  
6 dealing with a statistician who's providing all this valuable  
7 information regarding the adequacy of the paper records era  
8 database for use in the statistician's statistical sampling.  
9 It's using meta-analysis, and it represented that it's relying  
10 on more than 900 documents to come to the conclusion that,  
11 notwithstanding all the concerns and findings made by everyone  
12 for over 100 years, that what they found was okay.

13 Let me tell you something, Your Honor. This Court  
14 entered an order on Saturday night, and we thank you very much  
15 for spending the time. It's rare that I've seen, in my 33 years  
16 of practice, for that to happen on a Saturday night, on a  
17 three-day weekend, in particular: An order that the documents  
18 be produced to Plaintiffs.

19 In the course of very candid discussions we've had with  
20 government counsel, we've been told that many of the documents  
21 are missing, are not available, were never available even though  
22 they were referenced in the report; that many or most of the  
23 documents are missing critical pages. But they're not available  
24 because those documents were reviewed by NORC with the missing  
25 pages; that the database that was represented in the

1 meta-analysis report as being complete and usable in supporting  
2 the conclusions that this august group that rents space at the  
3 University of Chicago has produced really didn't exist; that  
4 there was no database completed; there is no usable database;  
5 and representations in the report that say, "We have created a  
6 usable database of all the documents that we relied on in order  
7 to come to our conclusions," doesn't exist, Your Honor, because  
8 the database was never completed.

9           So what we have, Your Honor, is a statistician using  
10 what most people consider to be junk science to come to the  
11 conclusion that, using incomplete data, that the government  
12 database and the paper records era is complete. We can  
13 appreciate irony, Your Honor, but that's not what a trustee does  
14 with respect to the Trust beneficiaries. Candor is critical.  
15 The Justice Department has been very candid with us since the  
16 order has been entered, Your Honor, so we have no complaints  
17 about the Department of Justice.

18           But there is something inherently wrong with the  
19 process with conclusions are made that have an impact on so many  
20 people, when there is no concern about precision and language,  
21 completeness of the information, or the conclusions reached.

22           On the other hand, Your Honor, I'm not sure it would  
23 have changed at all because the Litigation Support Accounting is  
24 for one purpose. As Mr. Kirschman said, it was originally  
25 created as a purpose of settlement negotiations with Cobell

1 plaintiffs.

2           Your Honor, the purpose, as stated in the  
3 administrative record, was to drive down the liability with  
4 respect to the negotiations with the plaintiffs, make sure the  
5 process is done to avoid errors, minimize errors. Because if  
6 the errors are reflected, the liability of the United States  
7 government will increase. That's the accounting that's being  
8 done for a sliver of the class. That's not the accounting that  
9 was declared.

10           And I do agree with Mr. Kirschman with one other  
11 respect. The steps taken aren't going to unduly delay the  
12 accounting, Your Honor. The steps taken are not designed to  
13 render an accounting, so they can't possibly delay the  
14 accounting. Certainly they're not so deficient that they delay  
15 an accounting that they state they're going to be providing,  
16 because they're not providing accounting of all funds to each  
17 beneficiary. They're not establishing accurate account  
18 balances.

19           The statistician, the august statistician who rents  
20 space at the University of Chicago, in a rebuttal report  
21 specifically said in response to criticisms from plaintiffs'  
22 statistical expert, the defending -- I think the credibility of  
23 the analysis done by NORC, that, "Don't tell us the steps we are  
24 taking in doing the analysis are incorrect or unsound with  
25 respect to the establishment of account balances, because we're

1 not doing that." The statistical sampling will not result in  
2 the establishment of accurate account balances. The most  
3 fundamental, easy requirement identified by Cobell VI and this  
4 Court, and it's not being done.

5 So Your Honor, I agree with Mr. Kirschman: The steps  
6 they are taking will not delay the accounting. They are not  
7 doing the accounting. You will hear testimony from witnesses  
8 that attest to that. You will see documents that provide that.  
9 We are dealing with data that has been distorted over the years,  
10 and has been used to protect the United States government. The  
11 declared duty is a duty that is owed to our clients. It can't  
12 be used as a shield to limit the liability of the United States  
13 government.

14 And as an aside, Your Honor, we also hear about the  
15 throughput issue, which this Court properly put before this  
16 Court, among the four questions that are to be addressed in this  
17 proceeding.

18 The government has said for years, and represented in  
19 affidavit, and Mr. Cason himself in an affidavit provided to the  
20 Court of Appeals said there's been \$13 billion that has gone  
21 into the Individual Indian Trust. There may be gaps in it, no  
22 information prior to 1909, no information prior to -- or  
23 subsequent to December 31, 2000. And there are all kinds of  
24 other problems with regard to gaps in collection.

25 But, based on the first date that Morgan (sic) Angel,

1 an expert of defendants, could find any deposits, that's why  
2 they began in 1909 to come up with that number; now we hear,  
3 "Oh, that's an overstatement of the number."

4 Your Honor, I understand the administrative record.  
5 I've read the record, so I now how difficult it is to review.  
6 So I understand the difficulty Mr. Kirschman has in reporting  
7 the information that's in the record, particularly since  
8 Mr. Kirschman wasn't involved in the trial, Trial 1.5, and other  
9 information.

10 But the government, not only in the administrative  
11 record, says that it's at least 13 billion. There's an  
12 August 22nd, 2001 e-mail when there was a discussion -- as a  
13 matter of fact, it was the Justice Department that opened up the  
14 discussion, because of the concern that the information with  
15 regard to throughput wasn't reliable coming from the Department  
16 of the Interior. So they brought the Treasury Department into  
17 it.

18 And Your Honor, as a result of the Treasury  
19 Department's brief review, there was a conclusion that maybe the  
20 information they're reviewing is inadequate and incomplete, and  
21 maybe we have to look at something else to see what we're  
22 talking about, throughput.

23 And Your Honor, in a conversation, in an e-mail that  
24 Bert Edwards was involved in, and others at Justice Department  
25 and Treasury, the decision was that they seemed to be short

1 about \$15 billion in throughput, only from 1951 to 2000, because  
2 no one took into consideration the overnighter transactions that  
3 Treasury was undertaking every night, using Individual Indian  
4 Trust funds.

5 Your Honor, overnighter transactions in banking  
6 parlance are fed funds transactions which are loans to banks  
7 overnight by the Federal Reserve. The Federal Reserve loans are  
8 pursuant to a discount rate. It's a below-market rate, but it's  
9 a rate that enables the banks to maintain their liquidity  
10 overnight. It's essential in the system.

11 Those funds were lent, interest was paid, and  
12 \$15 billion was not included in the throughput. And that's an  
13 August 22nd, 2001 e-mail that I'm referring to, and that will be  
14 discussed during the course of the trial.

15 So Your Honor, what you're looking at is, everything  
16 that you're going to be hearing is accurately, with respect to a  
17 litigation support plan, to drive down the liability of the  
18 government. But it is not what this Court declared, and it's  
19 not what the government owes to our clients. It is time, Your  
20 Honor, that we consider dealing with the issues that we filed  
21 this case about in 1996.

22 Many of our clients have died in the interim, Your  
23 Honor, and many of our clients have been put in nursing homes.  
24 Children have been going to school. The poverty has increased  
25 considerably over the years. We have disease and illness rates

1 on reservations that are obscene. Very little to do about it.  
2 The government is holding all the assets. There are  
3 approximately 11 million acres in Trust right now, Your Honor,  
4 generating income. 54 million acres existed at the time this  
5 Trust was created.

6 When I deposed Bert Edwards, the executive director of  
7 the Office of Historical Accounting, I asked him what happened  
8 to the 40 million or so acres of land that is no longer in the  
9 Trust. He said, "Well, I don't know." I said, "Did it just  
10 vanish?" He said, "Maybe it did."

11 Your Honor, we don't have a hole in the United States  
12 40 million acres, bigger than the Grand Canyon. We're talking  
13 about our clients' assets. This is the only thing they have. I  
14 really believe it is time for this Court, once it hears the  
15 evidence, listens to the testimony of the witnesses, that it's  
16 time to move forward and make the following findings:

17 Defendants in fact and as a matter of law have  
18 exercised and continue to exercise control over Individual  
19 Indian Trust assets, including all proceeds from the sale,  
20 lease, or investments of such assets.

21 Your Honor, that is directly in conformity with  
22 Mitchell II, the Supreme Court standard with regard to the  
23 application of Trust duties and Trust principles in accordance  
24 with Trust law.

25 Second, defendants, whom this Court has held to be in

1 breach of Trust, have not and will not discharge the declared  
2 accounting duty the United States government has owed plaintiffs  
3 since the government first exercised control over IIM Trust  
4 assets and revenues derived therefrom.

5 Your Honor, it's important, and Mr. Kirschman discussed  
6 the Paragraph 19 issues. I'm not going to go into much more  
7 issue there. We've beaten that issue to death for many years.  
8 But in fact, the Rosenbaum or E&Y report is not as described by  
9 Mr. Kirschman. When Mr. Rosenbaum testified, and one of his  
10 aids testified in Trial 1.5, he admitted that they didn't  
11 validate the data they were provided by the Department of  
12 Interior. They assumed it was correct, and not a single  
13 disbursement transaction was reviewed. They assumed they were  
14 correct.

15 What was given to Ernst & Young by the Department of  
16 the Interior were ledger sheets, and documents that Interior  
17 found that matched up with the ledger sheets. There was no  
18 investigation, no examination, nothing done in that regard, Your  
19 Honor.

20 And, Your Honor, when we were able to open what was  
21 then called the virtual ledger, which was difficult because of  
22 various coding and other problems, we discovered that the  
23 information wasn't accurately described at all, that documents  
24 that were allegedly matched may have had the name of the Trust  
25 beneficiary, but it nothing to do with the transaction. So the



1 \$60.94 that Mr. Kirschman refers to is just not case. I don't  
2 want to suggest that Mr. Kirschman is being dishonest. He  
3 wasn't involved in that litigation, so he doesn't know the  
4 details. But Your Honor, that is the fact.

5 And in fact, Your Honor, the government constantly  
6 represented to this Court that that should not -- that five  
7 named plaintiffs -- or Paragraph 19 review should not be  
8 considered an accounting because it wasn't undertaken as an  
9 accounting.

10 Further, in testimony before this Court, the government  
11 represented that it was not representative of whatever the class  
12 is for purposes of statistical reliability. So to now break  
13 that out and use it as a basis for saying what they're doing now  
14 is reasonable or rational and proper, Your Honor, is not  
15 supported by evidence of record. And to the extent the  
16 government wants to deal with that issue in this proceeding, we  
17 will do so.

18 But one last point on that. The government, was --  
19 there was a contempt proceeding, finding of contempt for failure  
20 to produce the documents. This Court subsequently issued an  
21 order for purging that problem. That order was never complied  
22 with. Interior never even made a request of this Court that the  
23 document production should be considered to be completed  
24 pursuant to the paragraph. Not even a request, Your Honor.  
25 This Court did request that both Treasury and Interior jointly

1 resolve it, and that wasn't done.

2 So what we have is a situation which isn't reflected in  
3 the record in accordance with Mr. Kirschman's discussion. As a  
4 result of this, Your Honor, we're going to ask this Court for  
5 one final finding:

6 That there is no useful purpose to be served by  
7 allowing defendants another shot at the target and delay further  
8 the fair resolution of this action. We're not talking about  
9 delaying the accounting, Your Honor, because they're not doing  
10 it; we're saying delaying justice in this proceeding.

11 This circuit has stated that if in fact it is futile to  
12 send an action back to the agency, there is no reason to remand  
13 it back to the agency. We have an agency in this case that has  
14 been a Trustee delegate, that has fiduciary duties, that has  
15 owed these duties for 120 years; hasn't discharged the duties,  
16 will not obey this Court's declaratory judgment.

17 Your Honor, we thank you very much for the time you are  
18 going to be dedicating to this. It's going to be a long trial,  
19 we suspect. The information is going to be important and  
20 revealing, notwithstanding the absence of many critical  
21 documents that have not been produced, which this Court will  
22 hear during the course of the examination; documents, Your  
23 Honor, that are adverse, based on their own description in the  
24 administrative record, to the representations made to this Court  
25 by the government.

Page 51

1           So, Your Honor, let's move this case forward, let's get  
2   it done. And hopefully, Your Honor, after more than 100 years,  
3   120 years, some of our clients are going to see justice. Thank  
4   you very much.

5           THE COURT: Thank you, Mr. Gingold.

6           The court reporter has been taking this down  
7   assiduously, so it's time for a short break. And when we get  
8   back, we'll call your first witness. Right?

9           MR. KIRSCHMAN: Yes, Your Honor.

10          THE COURT: All right. 10 minutes or so?

11                   (Recess taken at 10:51 a.m.)

12          MR. STEMPLEWICZ: Good morning, Your Honor. The  
13   Government calls James Cason.

14          THE COURT: All right, sir.

15                   (Oath administered by Courtroom Deputy.)

16          (JAMES CASON witness, having been duly sworn, testified as  
17   follows:)

18                                   DIRECT EXAMINATION

19   BY MR. STEMPLEWICZ:

20   Q. Would you please state your name for the record?

21   A. James E. Cason, C-A-S-O-N.

22   Q. What is your current job title?

23   A. Associate deputy secretary, Department of the Interior.

24   Q. And generally, what do your responsibilities in that  
25   position entail?

1 A. I assist the secretary and the deputy secretary in managing  
2 a wide variety of departmental programs.

3 Q. How long have you held that position?

4 A. Since August of 2001.

5 Q. Could you give the Court a brief outline of your employment  
6 history before August 2001?

7 THE COURT: It sounds like somebody needs a battery in  
8 a hearing aid. Thank you.

9 A. Yes. Immediately before I joined the Department of the  
10 Interior in August of 2001, I worked as vice president for the  
11 Unifrax Corporation as a private sector manufacturing firm.  
12 Before that, I worked in the Reagan/Bush administration, the  
13 Bush administration. At the Department of Agriculture I was the  
14 director for the Federal Crop Insurance Corporation.

15 Prior to that, I was with the Department of the  
16 Interior as a deputy assistant secretary for Land and Minerals  
17 Management, and prior to that, I worked in the private sector  
18 out in Oregon.

19 (OFF THE RECORD.)

20 BY MR. STEMPLEWICZ:

21 Q. Over the course of your current tenure at the Department of  
22 the Interior since August 2001, have you been asked to assume  
23 any additional responsibilities besides the normal job of  
24 associate deputy secretary?

25 A. Yes. I have a coordinating role for all things related to

1 Indian Trust litigation and Indian Trust reform. I have assumed  
2 duties and responsibilities for the Assistant Secretary of  
3 Indian Affairs for about two years until the administration  
4 nominated and had Senate confirmation of the new assistant  
5 secretary.

6 And I currently have the duties and responsibilities of  
7 the assistant secretary of policy management and budget.

8 Q. With regard to the latter, policy management and budget,  
9 what do your responsibilities involve with respect to the  
10 Department of Interior's annual budget?

11 A. I have a coordinating role, along with the director of  
12 office of management -- or director of budget to put together  
13 the department's budget. We are currently working on the fiscal  
14 year '09 budget and working with Congress on the fiscal year '08  
15 budget.

16 Q. And that would be for the entire department?

17 A. Yes.

18 Q. When you were undertaking those additional responsibilities  
19 in Indian Affairs, did your job require you to become involved  
20 in the budget for the Indian Affairs director?

21 A. Yes, it did. I was very involved in the development of two  
22 or three years of Indian Affairs budget. We spent quite a lot  
23 of time working through all of the line items in our budget,  
24 making determinations of how much money we would ask for in each  
25 line of our budget, defending it before OMB and defending it

1 before Congress.

2 Q. What does defending it before OMB and defending it before  
3 Congress involve, just in general terms?

4 A. The appropriations process is one in which we have direction  
5 about what targets we're supposed to meet in preparing a budget.  
6 We prepare the budget, submit it to the department; the  
7 department exercises its view on our budget, and that's a  
8 negotiate the process.

9 When the department is satisfied with the budget, and  
10 that goes all the way through the Secretary's review, then the  
11 budget is submitted to OMB, and we start a series of discussions  
12 with OMB about amendments to our proposed budget.

13 When we finish that process, the President releases the  
14 budget to Congress, and then after Congress has it, we usually  
15 have one or more hearings with Congress about the budget, what's  
16 included in it, and the priorities we have.

17 And then eventually at the end of that process, we get  
18 a Congressional budget of some sort.

19 Q. You indicated you arrived back at the department in  
20 August 2001. Was that following the Court of Appeals' first  
21 decision in this case?

22 A. Yes.

23 Q. Often referred to as Cobell VI, the February 2001 decision?

24 A. Yes.

25 Q. Was it at that time when you arrived that you immediately

1 began your involvement with the Indian Trust issues?

2 A. No. I was at the department for several months working on  
3 other things. And then roughly towards the end of the year,  
4 somewhere around November or so, I became involved in certain  
5 aspects of this litigation.

6 Q. And what aspects were they?

7 A. The initial aspect was at the time, as I recall, we were  
8 going through an issue related to the Secretary Norton being  
9 held in contempt by the Court, and then we also were going  
10 through an issue related to IT security.

11 On December 5 of 2001, we got a TRO related to our IT  
12 security profile for Indian Trust programs, and I became  
13 involved at that time.

14 Q. And did your responsibilities eventually lead to the  
15 historical accounting project?

16 A. Yes.

17 Q. Are you familiar with the Office of Historical Trust  
18 Accounting or it's often referred to, OHTA?

19 A. Yes, very.

20 Q. And in what sense are you involved with the OHTA activities?

21 A. I have been involved with OHTA for more than five years,  
22 basically beginning of 2002 afterwards, in discussing what  
23 actions we would take, what steps we would take to fulfill our  
24 historical accounting duties, deciding our strategy of how we  
25 would approach the job.

1           It's a very sizable job in which there was no clear  
2   model for us to operate with. So when we, we, our  
3   administration, first assumed the duties of undertaking the  
4   accounting from the former administration, there was no clear  
5   road map of how to go about that. So we went through a process  
6   of designing a study -- or designing the accounting, how we  
7   would go about that process.

8           And one of the things that's been important about this  
9   is it's been a learning exercise over time. As we've looked at  
10   the issue more and more over time, we've made refinements, we've  
11   learned more, and over the course of time, made adjustments to  
12   try to maximize the use of the funds that we have available.

13   Q. Now, is your role with respect to the historical accounting  
14   one of an accountant?

15   A. No.

16   Q. Or a Trust expert?

17   A. No. My role is a manager.

18   Q. And you're not an attorney, either?

19   A. No.

20   Q. And in what sense do you bring to bear your role as a  
21   manager on this project?

22   A. The principal role that I have with the historical  
23   accounting is to discuss with the staff what our options are for  
24   approaching our job, to discuss with the other folks who can  
25   inform us about how to do the job properly. In the course of



1 this we've consulted with outside experts, accounting firms, our  
2 lawyers in the Solicitor's Office, people at the Department of  
3 Justice, basically anybody that we could find that could give us  
4 insights on how to do this.

5 We've been more informed over time as we have heard  
6 from the plaintiffs what their expectations were. We've heard  
7 from the Court and gone through various iterations of Court  
8 review on this. And all of those things over time we've taken  
9 into consideration, deciding what we have done and what we plan  
10 to do on historical accounting.

11 Q. And in that effort, designing what you were going to do, did  
12 you have any prior examples of accountings that involved  
13 hundreds of thousands of accounts and tens of millions of  
14 transactions over several decades?

15 A. No.

16 Q. Now, how does OHTA fit in to all of this?

17 A. OHTA is the group that was created by Secretary Norton  
18 through a secretarial order, who had an exclusive charge of  
19 undertaking the department's responsibilities for historical  
20 accounting. That group was staffed up with a small staff,  
21 principally as a coordinating staff, and they manage a series of  
22 contractors who are actually engaged in doing the work.

23 Q. And was that organization staffed up before your arrival?

24 A. It started immediately before my arrival. As I recall, the  
25 secretarial order was signed July 1st of 2001, somewhere in that

1 timeline, and I came August of 2001, and we were operating on  
2 different tracks for a few months.

3 So it had begun the process, but staffing at OHTA has  
4 been a continuous process over time.

5 Q. And are you familiar with the July 2002 report to Congress?

6 A. Yes.

7 Q. And could you generally describe what that involved?

8 A. Well, it was the department's initial iteration of how we  
9 planned on attacking the historical accounting job that we had.

10 Q. And then the Court, I believe, ordered the department to  
11 submit a plan to the Court. Were you involved at all in that?

12 A. Yes, I was. We engaged a number of people across the  
13 Department of the Interior in drafting the January 6th, 2003  
14 plan. I was intimately involved in reviewing what had been said  
15 in the plan, helped draft parts of it. We had the senior  
16 management of the department involved all the way, including the  
17 secretary, in drafting that 2006 plan before it was submitted to  
18 the Court.

19 Q. You referred to 2006. You mean 2003?

20 A. 2003, I'm sorry.

21 Q. January 2003?

22 A. Yeah.

23 Q. Once that plan was put together and submitted to the Court,  
24 did you continue to exercise oversight with respect to the  
25 accounting project?

1 A. Yes.

2 Q. Could you describe that?

3 A. I've been involved in providing oversight and direction all  
4 the way until present, so I've been involved in the  
5 implementation efforts of the 2003 plan, I was involved in  
6 putting together the 2007 plan, and have regularly met with the  
7 OHTA staff about their progress and what kind of work they're  
8 undertaking.

9 Q. Now, what kind of staffing did OHTA undertake to perform the  
10 historical accounting?

11 A. Well, the staff, we have a leader of the group, than's a guy  
12 named Bert Edwards, who is a very well-known accountant in the  
13 area. Jeff Zippin, he is the deputy director of OHTA. They  
14 have a variety of staff people, including lawyers and  
15 accountants and other staff assistants who are designed to help  
16 run the historical accounting effort.

17 Then separately, we've relied very heavily upon  
18 contract assistance. We have accounting firms that have been  
19 involved in the process to actually do the accounting on  
20 individual Indian money accounts, and then we have another  
21 accounting firm who does quality control on the work done by the  
22 first accounting firms.

23 So we have, as was raised earlier, folks doing work who  
24 help us design the work that we do in a cost effective manner,  
25 you know, attorneys and historians and other folks who help us

1 do this job.

2 Q. And while all of this staffing and planning and organizing  
3 and submitting of things to the Court and so forth was going on,  
4 was there any work being done toward accomplishing the  
5 accounting?

6 A. Yes, there is. In my opinion, we have accomplished a  
7 considerable amount on the task of providing a historical  
8 accounting statement to individual Indians.

9 In the area of judgment per capita type accounts, we  
10 have done well over 80,000 of those accounts and have completed  
11 them on a transaction-by-transaction basis from the first  
12 deposit in the account through December 31, 2000. There's about  
13 80,000 of those that are done. That's about 86 percent of all  
14 of those type of accounts that we had planned to do under our  
15 plan.

16 We've also done a fair amount of work, and I'll call it  
17 indicator work, in the land-based accounts area, where as a  
18 statistical basis, we have a reasonably good sense of the  
19 relative accuracy of land-based accounts in the electronic era.  
20 And we're in the process now of preparing individual accounts  
21 that can be printed with the indulgence of the Court and sent to  
22 Indian beneficiaries.

23 MR. STEMPLEWICZ: Could we have the first slide,  
24 please?

25 BY MR. STEMPLEWICZ:

1 Q. Are you generally familiar with this document, Mr. Cason?

2 A. Yes.

3 Q. Could you briefly describe what it is?

4 A. This is our 2007 historical accounting plan that we  
5 submitted to the Court.

6 Q. Now, on the first page of the text shown here, this is an  
7 excerpt, there's a discussion about the work that was done --

8 THE COURT: Just for the record, Mr. Stemplewicz, I  
9 think we probably ought to have an AR number or an Exhibit  
10 Number or something for this.

11 MR. STEMPLEWICZ: This is the 2007 plan.

12 THE COURT: I know. Well, we know what it is. Is it  
13 Government Exhibit 1?

14 MR. STEMPLEWICZ: I believe it's an AR number, but I'll  
15 get that, Your Honor.

16 THE COURT: We don't have to have a lengthy caucus  
17 about this. Just proceed and we'll remember to put a number on  
18 this, an AR number.

19 MR. STEMPLEWICZ: We will, Your Honor.

20 BY MR. STEMPLEWICZ:

21 Q. Over the next few pages of this particular excerpt, there's  
22 a description of the work. Number one is the work regarding the  
23 five named plaintiffs and their agreed upon predecessors and  
24 interests.

25 Are you familiar with that?

1 A. Yes, I am.

2 Q. And what generally was your impression after this work was  
3 made familiar to you, or made known to you?

4 A. The first exercise you're talking about out of the 2007 plan  
5 was an assessment of the Cobell plaintiffs and their  
6 predecessors in interest, which I understand were identified by  
7 the plaintiffs for us to look at. And this was referred to as  
8 the Ernst & Young exercise, where we collected 165,000 documents  
9 related to these individuals, the 37 individuals, and basically  
10 looked at what those documents told us about the cash history  
11 associated with those accounts.

12 In the end, the things that I think were important  
13 about this is that we demonstrated we had the majority of the  
14 documents needed to do an accounting, not all, but a majority of  
15 the documents, that we had them over time, as the earliest  
16 document was from 1914, that there were errors that we found in  
17 these accounts, but the errors tended to be small and they tend  
18 to be on both sides of the ledger, and that overall, when you  
19 took a look at all the errors added up identified for these 37  
20 accounts, we had a net overpayment for the Cobell class, or the  
21 Cobell plaintiffs and their predecessors in interest.

22 Q. Now, the second item mentioned there down toward the bottom  
23 of the screen is the reconciliation of the judgment per capita  
24 accounts. You've already mentioned that, so if we could go to  
25 the third item listed, which is the litigation support

1 accounting.

2 Do you see that?

3 A. Yes, I do.

4 Q. Where did that term come from? I think you mentioned it has  
5 something to do with an appropriations bill?

6 A. It does. The appropriations bill, about 2004, somewhere in  
7 there, 2004 or 5, had a provision that gave direction to the  
8 Department of the Interior about how we could spend our  
9 historical accounting money. As I recall the sequence of  
10 events, this was after the first structural injunction from the  
11 District Court that suggested that we would need to do an  
12 accounting that would be very, very expensive, somewhere on the  
13 order of 10 to 12 billion.

14 And when approached with those results, Congress  
15 reacted and said, well, we're going to put some limitations on  
16 this for the time being as it gets straightened out.

17 The limitations, as I recall, was basically that we  
18 could continue to do the work that we had done for collecting  
19 data and records and imaging and indexing those records, we  
20 could continue work on judgment per capita accounts, and we  
21 could do litigation support accounting, but conspicuously off  
22 the list was doing work directly on land-based accounts.

23 To me, in my role with the Department of the Interior,  
24 it seemed that there was a fine line that we could walk to make  
25 some progress on land-based accounts while being consistent with

1 the instructions we had from Congress. And in that way, what we  
2 did is designed a statistical sample of the accounts on the  
3 land-based side, and for the purposes of litigation support, to  
4 essentially shed light on an area we did not know about, we  
5 designed an investigation into the land-based accounts area.

6 And the result here is basically what we found by  
7 taking a look at the large dollar accounts or transactions, and  
8 a statistical sample of the small, smaller than \$100,000,  
9 transactions.

10 What we found out of that is that, again, we found a  
11 handful of errors. They tended to be on both sides of the  
12 ledger, they tended to net out to a relatively small error rate.

13 MR. STEMPLEWICZ: If we could go to the last page of  
14 this slide, there's a fourth item dealing with the pilot tests.

15 BY MR. STEMPLEWICZ:

16 Q. What can you tell us about those?

17 A. Well, the pilot tests are designed to make sure we have the  
18 kind of information that we need to settle the regions that we  
19 have. In Indian Affairs, we organize our work in 12 regions,  
20 and that we started off with a couple of the smaller relative  
21 regions, to go take a look at the transactions and the  
22 supporting documents for those in the hopes that we could  
23 segment our work and eat the elephant in bites.

24 Q. Why is it important in a project like this to do pilot  
25 tests?



1 A. Well, if you go back the beginning of our responsibility to  
2 do historical accounting, there has not been in the past and  
3 still as of today, no previous model about how exactly we should  
4 go about this job.

5 And there's been a lot of rhetoric about what we would  
6 or would not find, and a lot of suggestions what we do or should  
7 do about this task. And we're finding that we learn a lot as we  
8 go through the process, and that that's an iterative process  
9 where we learn and redesign, learn and redesign.

10 And the pilot test enabled us to go test our  
11 assumptions for project design, and with those tests, then we  
12 can apply a more tried and true methodology for the bigger, more  
13 difficult areas.

14 MR. STEMPLEWICZ: Could we go to the second slide,  
15 please? And I'll represent that this is from the same document,  
16 just different page numbers, Your Honor.

17 THE COURT: It would be helpful if for the record you  
18 would identify the page numbers.

19 MR. STEMPLEWICZ: Yes, Your Honor. These would be  
20 pages six, seven, and eight from -- again, it's part two of the  
21 historical accounting project.

22 THE COURT: All right.

23 MR. STEMPLEWICZ: That was filed, I believe, May 31st,  
24 2007.

25 BY MR. STEMPLEWICZ:

1 Q. The lessons from the work that was performed, could you give  
2 a brief summary of where that led you to?

3 A. Briefly, what we have learned so far in the accounting is  
4 that we do have records to do the accounting, that they can be  
5 indexed and used by accounting firms to do the work, that we can  
6 assemble historical statements of accounts, that we have found  
7 errors. They overall tend to be small, tend to be few, tend to  
8 be on both sides of the ledger, and tend to net out against each  
9 other.

10 We have not found any instances of systemic accounting  
11 error or systemic fraud. We have covered a fair amount of  
12 territory so far, and that we think that the job, as we've  
13 defined it, is a doable job.

14 Q. And where did that lead you?

15 A. Well, it led us to preparing the 2007 plan to the Court, to  
16 say, based on our 2003 plan, we've been implementing that plan,  
17 and over the course of time, we have learned things about the  
18 historical accounting job both in terms of what kind of data  
19 available and how robust that is, and how much data we need to  
20 undertake the reconciliation job to determine accuracy of the  
21 disposition of funds in our accounts.

22 And so it led us to a new iteration of a 2007 plan.  
23 Contrary to some voiced concerns about a plan to do a plan, it's  
24 not. We have actually been implementing the 2003 plan, we have  
25 accomplished a lot under that plan. And that the 2007 plan is a

1 continuation of the work that we have already accomplished, and  
2 the 2007 plan is a road map of the activities that we plan to  
3 undertake to finish this job.

4 MR. STEMPLEWICZ: For the record, Your Honor, the 2007  
5 plan is embodied in AR 564, 565, and 566.

6 THE COURT: Thank you.

7 BY MR. STEMPLEWICZ:

8 Q. Did the goal of the historical accounting project change  
9 upon the adoption of the 2007 plan?

10 A. No. The goal has been the same. We envision that our task  
11 is to account for funds that have been part of individual Indian  
12 money accounts. We still have that same goal.

13 Our 2003 plan envisioned providing a historical  
14 statement of account to Indian beneficiaries that had an account  
15 opened on or after October 25, 1994, the date of the '94 Reform  
16 Act. That goal is still the same.

17 We also had a goal of providing assurances to Indian  
18 beneficiaries about the relative accuracy of our data systems  
19 for recording their transactions and their account, and that  
20 goal is still the same.

21 Q. Are there any changes in methodology between 2003 and 2007?

22 A. There is. We made a handful of, I'll say, noteworthy  
23 changes. One of the changes was the timeline for getting the  
24 work done. Originally in the 2003 plan, we'd envisioned  
25 completing our work for about \$335 million over five years. We

1 were not able to do that, in large part because we had  
2 underestimated the size of the task and how expensive it would  
3 be to do. And we overestimated our ability to get funding from  
4 Congress.

5 We asked for considerably more money from Congress than  
6 we actually got, and as a result that's lengthened the timeline  
7 to do work.

8 Conversely, we found that the error rate that we  
9 encountered in the transactions that were actually reconciled  
10 and our ability to extend that lesson to the broader universe  
11 suggested that we could do fewer transactions to reconcile -- to  
12 still arrive at an accurate appraisal of the system, and how  
13 accurate the transactions were in the system.

14 So we had some trade-offs, that the cost to do a  
15 transaction was considerably higher than we had anticipated, but  
16 the error rate was sufficiently low that we could have much  
17 fewer transactions actually assessed, to arrive at a conclusion  
18 about the relative accuracy of our accounting system.

19 So those are some of the key things.

20 Q. What about any provisions in the plan with respect to the  
21 non-fund assets, or the land assets?

22 A. We did make a change there. In the 2003 plan, we had taken  
23 the position that we would provide a Trust beneficiary that had  
24 land assets that were part of the accounting, a statement of  
25 what land assets they had at the time we issued the statement.

1           So it wasn't an accounting over time, what had happened  
2 through the last 100 years with that particular allotment, but  
3 it was a statement of what do you own today.

4           We made a determination in the 2007 plan to delete that  
5 particular task because we have separately work that's going on  
6 with the Office of Special Trustee and the BIA, who's going  
7 through a process of updating -- converting our title system  
8 from the old legacy LRIS system, that's Land Record Information  
9 System, to a new TAAMS system, that's T-A-A-M-S. We're  
10 converting our system to a more current, more robust land title  
11 system. And we're going through the process of uploading  
12 manually done real estate transactions into the system so that  
13 we have one place to go for title information.

14           Then the special trustee is planning to issue, along  
15 with his periodic statements of account, the cash accounts, a  
16 record for each of the individuals about land they own, whether  
17 it's leased or not.

18           So we made a decision that rather than confusing  
19 matters of having this title-related information in the  
20 historical accounting process, that we would focus clearly upon  
21 the task of accounting for funds, and remove the distraction  
22 associated with land title stuff.

23 Q. Now, there was provision in the 2003 plan for what's known  
24 as special deposit accounts. Are you familiar with that term?

25 A. Yes, I am.

1 Q. And how, if any, did the 2007 plan change the approach to  
2 that?

3 A. In the 2003 plan, we had incorporated special deposit  
4 accounts as a fourth category of types of accounts that we would  
5 do accounting on, or historical accounting.

6 What we found over time is that it didn't really fit  
7 the model of what we were trying to accomplish for the  
8 historical accounting effort. And the reason it didn't is our  
9 objective for doing the historical accounting is to provide each  
10 individual IIM account holder with an account of the  
11 transactions in their account. And in the case of a special  
12 deposit account, there isn't an end beneficiary associated with  
13 the account per se. It's not my account or somebody else's  
14 account; the FTA is basically a temporary holding account until  
15 we determine who the proper recipient is of the money in it.

16 And so we have circumstances where, when it's not clear  
17 immediately who has the proper ownership of the money in the  
18 SDA, we put it there until we figure that out, and then we  
19 distribute it to the IIM account holder.

20 And once the money comes out of the SDA to the IIM  
21 account holder, then their accounting for their account would  
22 take account for that deposit.

23 Q. Are SDAs still being looked at by the department?

24 A. The SDAs at this point are still being looked at. We are  
25 expending two and a half to three million dollars a year on

1 looking at the SDAs. And basically what we're trying to do in  
2 those is go from largest dollar volumes down to smallest dollar  
3 volumes, to distribute cash out of those as rapidly as we can.  
4 So work is still going on with those, we just haven't added  
5 those into the 2007 plan.

6 Q. Now, I believe in discussing these changes, you mentioned  
7 trade-offs that you had to consider.

8 MR. STEMPLEWICZ: Could we have the third slide,  
9 please?

10 And again, Your Honor, this is from the part two of the  
11 historical accounting project, and this is page four of that  
12 document.

13 BY MR. STEMPLEWICZ:

14 Q. You see on the screen there, Mr. Cason, under "balancing the  
15 objectives," the trade-offs that are listed in bullet points?

16 A. Yes, I do.

17 Q. Could you explain how the idea of trade-offs comes into play  
18 in your decision making here?

19 A. Sure. We have the task at the Department of the Interior to  
20 actually undertake the historical accounting. Within that task,  
21 we have to take a look at a variety of factors that influence  
22 our project design and how we actually carry that out.

23 Part of what we have to take a look at is how much  
24 money we'll have available to do this work. If we design a  
25 historical accounting that requires \$5 billion worth of work,

1 and we have \$50 million a year, that indicates that we would be  
2 at this for the next 100 years.

3 Our sense of the Department of the Interior is no one  
4 in the process want to have a historical accounting project that  
5 has that long a duration.

6 We also have to take a look at how quickly we want to  
7 try to get this work done. It's our sense that everybody in the  
8 process would appreciate having a product sooner than later.  
9 There's -- a lot of comments have been raised about the lack of  
10 timeliness in the process, and that I can assure everybody that  
11 it's in our interest to get it done as rapidly as possible.

12 In order to do that, between the resources we have and  
13 desiring to hit some sort of timeline to get this done in the  
14 foreseeable future, we have to make some trade-offs and choices  
15 about what kind of work we'll do. Because there is no free  
16 lunch in the process.

17 And having no free lunch, the more complicated we make  
18 the process with the same budget environment, the longer it will  
19 stretch the process out before we can actually produce the  
20 accounting required by the Court.

21 So we have gone through a process to look at those  
22 factors. We look at how accuracy plays in, how the completeness  
23 of data plays in, that the more data we need, the more we  
24 review, the longer it takes, the more expensive it is. And we  
25 have tried to balance all of those things in the end to take a



1 look at what is the product we're going to produce for the  
2 beneficiary.

3 We need to be able to give them a historical statement  
4 of account that says, here's the cash that came into your  
5 account, here's the cash that came out of our account, here's  
6 the balances of your account and here's the relationship between  
7 the balance we calculate for the historical period and the  
8 opening balance for the current period.

9 So we need to that, and it's from our standpoint that  
10 we think we need to provide some assurances as well about the  
11 relative accuracy of that data. Because so much has been raised  
12 in terms of doubts and questions about how we've carried out the  
13 stewardship of this Trust over the last 100 years, that we need  
14 to do some work to provide assurances to people about the  
15 relative accuracy of their accounts.

16 Q. Now, you mentioned earlier about limits that Congress  
17 imposed, specific limits that Congress imposed in connection  
18 with the historical accounting work. What about in terms of  
19 funding? How has that operated as an effect on the work you're  
20 dog?

21 A. Funding is a limitation. It limits how much we can do and  
22 how rapidly we can do it.

23 When we originally started the process with the 2003  
24 plan, we had anticipated and asked Congress for over  
25 \$100 million a year to undertake the work. We didn't receive

1 that from Congress; in general, received less than half of what  
2 we asked for.

3 That's had the effect of stretching out the time period  
4 in which we could get work done, and how much we could do per  
5 year.

6 We went two years, as a budget strategy to stay  
7 consistent with the 2003 plan, and two years in a row, Congress  
8 basically sent the message back in their appropriations  
9 decisions that they were not willing to spend that much money on  
10 the historical accounting process.

11 There is a trade-off for us that's important. And I'd  
12 like to explain why we made different choices in the third year  
13 to come into the same ballpark that Congress had been willing to  
14 spend. And that is, when we placed in the budget \$100 million,  
15 and we get 50, when we do that, we give up the ability to ask  
16 for 50 million somewhere else in the budget.

17 And after two years of trying with Congress to see  
18 basically what they were willing to fund, we made some other  
19 decisions to ask for funding for this project in the ballpark of  
20 what Congress was willing to give us, and then ask for other  
21 things in the Indian programs for the other monies that we  
22 weren't getting.

23 Q. Now, I've had put up on the screen what's been marked as  
24 Defendant's Exhibit 102.

25 MR. STEMPLEWICZ: Perhaps we could zoom that, make it a

1 little bit larger?

2 A. You mean, you're saying I'm getting old?

3 BY MR. STEMPLEWICZ:

4 Q. No, I'm having the same problem.

5 I think that's better.

6 A. Thanks. That's good.

7 Q. Do you see what you just discussed reflected in those  
8 numbers? First of all, what is that chart there, or table, as  
9 you understand it?

10 A. The chart is a reflection of the Department of the Interior  
11 budget associated with historical accounting, the project, over  
12 the course of this administration, beginning with FY 2001  
13 through a projection of our request for FY 2008 that's currently  
14 before Congress.

15 Q. And you mentioned about the change in the amounts requested  
16 over time, and that's reflected there in that exhibit?

17 A. Yes. If you take a look at year 2004, the budget request  
18 was 130 million. What we actually got was 44 and a half  
19 million; in 2005, we asked for a little over 109 million, we got  
20 57 million; in 2006 we asked for 135 million, we got 56 million;  
21 and then the following year in 2007, we basically asked for what  
22 we got the year before, the 56 million.

23 Q. And the basis of that decision was what?

24 A. The basis of the decision was related to the trade-offs that  
25 occur as part of the budgeting process.

1           If I could use 2006 as an example, when we place in our  
2 budget and defend to OMB a request for 135 million, and we send  
3 it up to the Hill and say, this is what we would like, and the  
4 Hill's unwilling to spend that much money on this particular  
5 task, they took the difference, about 75 million or so, or 70  
6 million, and applied it to something else for which we had no  
7 real input in saying, it should go here or here or here.

8           So it becomes a freebie for the Congressional  
9 appropriators to just whack this part of the budget and use it  
10 for something else that's important to them.

11           So as a tactical matter, we went for three years asking  
12 for what we thought we needed to do the historical accounting on  
13 the schedule that we had laid out in our 2003 plan, and it  
14 became clear that Congress was unwilling to fund it at that  
15 level. And so we went down to a level that Congress seemed  
16 willing to fund.

17 Q. You mentioned the term in connection with the appropriators,  
18 that something else that is important to them, would that  
19 necessarily be uses that are -- or meet the priorities of the  
20 department with regard to Indian Affairs?

21 A. Well, it could be the department, it could be Indian  
22 Affairs, it could be the department in a broader sense, or it  
23 could be other programs that are under the purview of that  
24 particular appropriations committee.

25 Q. So what did the department do with that difference in 2007

1 in requesting what had been appropriated the year before?

2 A. I don't know specifically, because there's no real tie to.

3 We went to 56 million instead of 135 and we took that 70 million  
4 and put it in particular places.

5 What we did do, as I recall in the 2007 budget, we had  
6 taken the overall target that we had for preparing Indian  
7 Affairs budget, which we looked at, both OST and our budget for  
8 Indian Affairs kind of together, because they both represent  
9 Indian programs, and that in meeting our target, we utilized  
10 that 70 million in other places so that we could fund other  
11 things within our budget, whether it's welfare or education or  
12 other programs that we also have prying needs for.

13 Q. And where does the input come from in that kind of decision  
14 making?

15 A. Well, input comes from a variety of places. We have a broad  
16 cross section of people who are involved in preparing a budget,  
17 and the process that we use actually begins out in the field  
18 where our field staffs supply us information about what they  
19 think they need in the upcoming budget.

20 And that is massaged by the Bureau of Indian Affairs  
21 budget office, or the assistant secretary's Indian budget, and  
22 then it goes to the departmental budget and then it goes through  
23 OMB.

24 So people all the way through the management chain, in  
25 the Indian Affairs case, while I was acting as the assistant

1 secretary's position, we would start in the field, we would talk  
2 about it with the budget office, what all the field folks had.  
3 We had a separate group that we had a committee of Indians  
4 representing the regions, an Indian budget committee that we  
5 would take our budgets to and discuss with them, what we were  
6 planning to do with the budget and what our priorities were to  
7 get information from them, or our sense of priorities.

8 And then it would go to the department's budget office  
9 and get input from the front Office of the Department of the  
10 Interior all the way through the secretary, and then go over to  
11 OMB and get their input in the process.

12 Q. There's a discussion in the footnote of this exhibit about  
13 the appropriation process really being a two-year in advance  
14 sort of process. And how does that impact the decision making  
15 in regard to things like the historical accounting project or  
16 any other long-term matter like this?

17 A. Well, my interpretation of what would happen here in 2001 is  
18 when the administration takes control in, I guess, January of  
19 2001, the budgets were already set for the departments before we  
20 assumed office. That was set by the previous administration.  
21 And that in establishing the Office for Historical Accounting,  
22 we needed to get that into the budget cycle. So early on in the  
23 process, it's robbing Peter to pay Paul, to get off the ground  
24 to do things until the budget cycle catches up.

25 So, for example, right now what we're working on is the

1 fiscal year 2009 budget. We still don't have a fiscal year 2008  
2 budget, and we just wrapped up our 2007 budget.

3 Q. So that, for example, in 2001, when OHTA was set up, it  
4 appears that in reacting to, say, the Court of Appeals'  
5 decision, what you're saying is that you had to do a little bit  
6 of shifting out of the normal process --

7 A. Yes.

8 Q. -- to accommodate what needed to be done?

9 A. Yes. And it's not unusual that we have to do something like  
10 that, because the Department of the Interior is a very large and  
11 complex organization, and we do from time to time get, I'll call  
12 it special requirements that occur, that don't fall within the  
13 anticipated budget cycle.

14 And in those circumstances, we look for ways to use all  
15 of our resources effectively, see if there are other resources  
16 that we can free up from lower priority things to get started on  
17 key projects prior to the budget cycle catching up.

18 So we do that in this case and we do it in other areas  
19 as well.

20 Q. How do you perceive, as a person in the position you hold,  
21 the differences between the 2007 plan and the 2003 plan in terms  
22 of getting this job done?

23 A. I would say the base of both plans is relatively the same.  
24 The job or task is still the same that we're trying to  
25 accomplish, and that is to provide to individual Indian money

1 account holders, who we intend to do an accounting for, a  
2 historical statement of accounts, and to provide them a sense of  
3 the relative accuracy of the system. So that overall job is the  
4 same.

5 A difference in the 2007 plan is we've done a little  
6 bit more to prioritize what work we would do and in what order  
7 we would do it.

8 Because this is a very sizable task that we have before  
9 us, and it's important to be clear about how we would attack the  
10 job, clarify exactly what the job is and how we would go about  
11 accomplishing the job so everybody is working in the same  
12 direction.

13 Within the 2007 plan, we changed that marginally to  
14 talk in terms of how many transactions we needed to pull to get  
15 an assessment of the relative accuracy of the system. So that's  
16 different. We reprioritized how much emphasis we were going to  
17 put on special deposit accounts, we reprioritized the work that  
18 we were doing on judgment per capita accounts, so that we could  
19 target our money more effectively at making progress on the  
20 land-based accounts.

21 Q. And in regard to land-based accounts, does the 2007 plan  
22 envision getting to more of those in the near future?

23 A. Yes, it does. It's my understanding that what our target  
24 is, is that by the end of this year, we would be able to print a  
25 historical statement of account for about 50,000 land-based



1 account holders, and then next year we would in the position to  
2 print another 125,000 land-based account holder statements.

3 One of the things that's interesting about the task is  
4 that we have literally tens of thousands, up to 175,000 of our  
5 account holders actually are within the electronic era. And so  
6 we're in a position to be able to print statements once we have  
7 completed our data completeness validation process, and that  
8 we've made the listing of transactions as complete as we can  
9 make them and get to a point where we've done enough testing of  
10 the information that provides reasonable assurances about the  
11 accuracy of the data.

12 Q. Are you satisfied that the planned accounting under the 2007  
13 plan is adequate to meet the Secretary of the Interior's  
14 obligations under the 1994 Act?

15 A. Well, to the best of my information, we believe that this is  
16 a reasonable accounting to undertake to meet our requirements to  
17 provide an accounting of funds that have passed through these  
18 IIM accounts over time.

19 We recognize that there's lots of opinions about what  
20 we should do or could do in terms of providing accounting, but  
21 we've designed what we think is a reasonable process to produce  
22 a reasonable product that would inform IIM beneficiaries about  
23 the way that we have managed the cash that has come into and  
24 through their accounts.

25 Q. Now, the accounting, when it's complete, will not cover

1 every single account, every single transaction through out  
2 history. Correct?

3 A. That's correct.

4 Q. And much has been made about the accounts and transactions  
5 that are excluded from the account. Could you explain to the  
6 Court how it came about to determine which accounts would be  
7 included within the scope of the accounting and which wouldn't?

8 A. Yes. For us to undertake the work to fulfill our historical  
9 accounting duties, it's important for us, the Department of the  
10 Interior, to be clear about what we're trying to take on.

11 And at the early part of this process, as we were  
12 designing the task or defining the task that we had before us,  
13 we took a look at what the Court had said about current and  
14 former beneficiaries. It's my understanding that that term has  
15 never really been defined, although we've had lots of discussion  
16 about it.

17 And we took a look at why are we trying to do an  
18 accounting, and the most direct purpose is to inform  
19 beneficiaries, but also there's a link to clarifying whether or  
20 not the opening balance of an account for current accounting is  
21 accurate.

22 So we have an ongoing responsibility with hundreds of  
23 thousands of IIM account holders who have accounts that are open  
24 today and have been open for some period of time, where we  
25 wanted to be able to provide them assurances that the opening

1 balance of their account was accurate. That was what was being  
2 called into question.

3 And in doing that, we tried to design an approach that  
4 would go back to, on an account-by-account basis, to the first  
5 deposit in an account for an individual, and record that first  
6 deposit and all the transactions that occurred, whether they be  
7 deposits or disbursements or interest deposits, and trace over  
8 time for the history of that account the activity that had  
9 occurred during that account and draw a conclusion as of  
10 December 31, 2000, what the ending balance of that account was  
11 then, and then compare that to the opening balance for a  
12 statement beginning January 1st of 2001.

13 So that was the task we were trying to do. And the  
14 principal driver was how do we provide this information to the  
15 beneficiaries in a straightforward, meaningful way, as rapidly  
16 as we could within the funding resources we had available to us.

17 We made decisions about excluding those individuals who  
18 had closed the accounts prior to October 25, 1994, the date of  
19 the Reform Act, and basically with the thought process that we  
20 have no continuing relationship as far as having Trust funds on  
21 deposit that's being invested under the Act of 1938.

22 And so it was less important for us to provide  
23 accountings for those individuals over the last 100 years than  
24 it was to do the individuals for which we had a continuing Trust  
25 relationship.

1           So we did make some decisions to basically prioritize  
2   how we would expend our money and for whom we would do an  
3   accounting, and we did focus on providing accounting for those  
4   who we actually have a continuing Trust relationship under the  
5   '94 Act.

6           We recognize that as the government deals with this  
7   issue, that the Court may have a different view of that or  
8   Congress may have a different view of that over time, but at  
9   least as a beginning position, that seemed to be the most  
10   productive way to design the project.

11   Q.   And do such considerations as staffing and time to do all  
12   those additional accounts come into play here as well?

13   A.   Sure. We recognized at the beginning and throughout this  
14   process that there's only a certain amount of money that we can  
15   get out of Congress to do this work. And the bigger we make the  
16   job, either the more it will cost in a shorter timeline or the  
17   longer it will take on a constrained budget.

18           So when we took a look at this, we tried to find what  
19   we think is the best sweet spot of getting work done in a timely  
20   way, getting a proper amount of information to the beneficiaries  
21   to demonstrate to them how we've managed their cash funds over  
22   time, to demonstrate the relative accuracy of the system within  
23   the resources we had.

24           So all of those are factors that we consider in trying  
25   to design the work that we are doing here.

1 Q. Is that generally the cost benefit paradigm you look at?

2 A. Cost benefit is, I'll say, an interesting term, where over  
3 time that's been both an intuitive process and an analytical  
4 one.

5 And what I would suggest, the intuitive part is  
6 basically if I make the job huge, then I know it's going to cost  
7 a lot more money; if I constrain the size of the job to  
8 manageable proportions, it will cost less, and my ability to get  
9 funding from Congress is greater.

10 We have also done the analytical approach or cost  
11 benefit paradigm when we've assessed the relative cost of  
12 implementing the structural injunctions that were issued from  
13 the Court earlier. And in that assessment concluded it would  
14 cost somewhere between 10 and \$12 billion to undertake that kind  
15 of accounting.

16 And more recently, in response to the judge's questions  
17 about what would it take to add certain elements, we've also  
18 done some analytical cost-benefit analysis on that.

19 Q. Where do you see the process going from here as far as  
20 getting this accounting completed?

21 A. Well, we're actively involved in the process, and have been  
22 for several years, to undertake and complete the process. In  
23 general categories, we have done most of the work. If I recall  
24 correctly, it's about 75 percent of the work on special deposit  
25 accounts. We didn't include that in the 2007 plan, but we're

1 still doing that work and we're largely -- made great progress  
2 on that.

3 On the judgment per capita accounts, we're about  
4 86 percent completed for the judgment per capita accounts we  
5 intended to work on, the ones that are post '94. And on the  
6 land-based accounts, as I had said before, we think we're in a  
7 position to make pretty good progress on those, that we think  
8 we'll be prepared to issue about 50,000 statements this year,  
9 125,000 statements next year. And that we recognize that over  
10 the next four years we still have an outstanding issue of  
11 digging into what's called the paper tail, past the electronic  
12 era, and examining the accounts that have occurred over the last  
13 now 70 years, since 1938.

14 Q. And in terms of again, getting the job done, what is it that  
15 the department needs?

16 A. In order to get the job done?

17 Q. Yes.

18 A. Well, it needs funding. That's a critical element, because  
19 nothing moves without money from Congress. It needs to continue  
20 to engage the staffs that we have, the accounting firms, the  
21 experts that we have online to assist us in designing and  
22 carrying out the program. And I guess it needs clarity about  
23 the plan that we have, is this plan the right plan for us to do.  
24 We believe it is, but we recognize that there are others who  
25 have different opinions about this.

1           Because one of the things that's important is we don't  
2   want to be in a position to make false starts anywhere, and the  
3   earlier we know about requirements, the easier it is to  
4   accommodate those requirements. So I think clarity in the  
5   process would be helpful.

6   Q. And as an element of sort of the mechanics of getting the  
7   whole process completed, is there a regulatory initiative in  
8   place, or ongoing?

9   A. Yes, there is. We're going through a process within  
10   Interior to draft a -- I'll call it administrative appeals  
11   process. And what our intention is for the administrative  
12   appeals process is to lay out clearly for IIM beneficiaries, and  
13   we're doing a similar exercise for Indian tribes who have  
14   similar claims, to lay out a process wherein we do our work to  
15   prepare a historical statement of account and an assurance  
16   statement, we provide that to the IIM beneficiary, and if the  
17   IIM beneficiary has other data or concerns about how we did it,  
18   suggestions where we made an error, what we would like to be  
19   able to do is have an administrative appeals process in place  
20   where we develop an iterative process between OHTA, who produces  
21   the statements, and the individual who got it who thinks they  
22   know something we don't.

23           And to actually get that information, review the  
24   account, see if there's something that we missed in the process,  
25   get the account as accurate as possible administratively before

1 we engage in a process with the Court.

2 So we are developing a rule-making to that effect. And  
3 as I understand it, one of the things that we've discussed with  
4 the Court is a motion to at least enable us to amend the class  
5 communication order in a way to proceed down the federal  
6 register process to seek public comments about the rule under  
7 APA so that we can bring that to conclusion.

8 I know that's an issue that's before the Court, and the  
9 parties have different views on that, but it would be helpful to  
10 be clear about how we do -- how we address any concerns or other  
11 data that we don't have, other than just going straight to  
12 Court.

13 Q. You also mentioned that there are regulations, both as to  
14 tribes and as to IIM.

15 A. Uh-huh.

16 Q. Just to be clear, those budget figures that we looked at for  
17 OHTA earlier, those involve both work on IIM accounts and on  
18 tribal accounts?

19 A. Yes, they do. We have, I'll say, similar issues between IIM  
20 account holders of this litigation and the litigation we have  
21 with some tribes across the country. We are doing historical  
22 accounting work for tribes as well, and some of the budget  
23 numbers we're looking at is used for that purpose.

24 Q. Is it predominantly at this point one or other, or is it...

25 A. Over time, it's been predominantly associated with our work



1 for the IIM account holders as opposed to tribes. Roughly out  
2 of the \$57 million budget, we'll spend about 40 million on IIM  
3 stuff and the balance on tribes.

4 MR. STEMPLEWICZ: Your Honor, I have no further direct  
5 examination.

6 THE COURT: All right. Thank you.

7 THE WITNESS: Excuse me, would it be possible to get  
8 some water?

9 THE COURT: You have a constitutional right to have  
10 water on the witness stand.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: We'll see if we can get you some.

13 Mr. Dorris?

14 CROSS EXAMINATION

15 BY MR. DORRIS:

16 Q. Good morning, Mr. Cason.

17 A. Hi, Counselor. How are you?

18 Q. Good. We've met before, so let me get right to the  
19 question.

20 Let me start close to where your direct examination  
21 ended to clear up something in my mind. As I read the 2007  
22 plan, I understood that the Department of the Interior was not  
23 doing -- providing an accounting or any information to  
24 beneficiaries for closed accounts. Am I correct on that still,  
25 accounts that were closed as of October 25, 1994?

1 A. That is our plan that we would not be doing that. That's  
2 correct.

3 Q. Right. And what's stated in the 2007 plan for the reason  
4 for that is that the Department of the Interior interprets the  
5 1994 Act as not requiring the provision of an accounting for  
6 closed accounts as of the effective date of that act. Is that  
7 correct?

8 A. That's been our interpretation, yes.

9 Q. So when you said earlier in your testimony that you were not  
10 provided -- the Department of the Interior was not providing  
11 that type of information regarding closed accounts because you  
12 wanted to do what was in your sweet spot?

13 A. Uh-huh.

14 Q. Let's be clear. Are you saying that you have an obligation  
15 to provide a accounting for closed accounts as of October 25,  
16 1994 or not?

17 A. It would be not. And just so we're clear, the former  
18 commentary is in recognition that we, the Department of the  
19 Interior, do not have the exclusive decision-making authority on  
20 that issue.

21 We have taken a look at the law and the way we think  
22 the law ought to be interpreted, and taken a look at the court  
23 cases that have been involved here - and we've had many - and  
24 from our conclusion, we don't think we're obligated to do an  
25 accounting beyond the individuals who have accounts open on or

1 after October 25, '94.

2           However, we also recognize that there are two other  
3 major parties within government who have a say in that process,  
4 and that's both the Court and the Congress, who may decide  
5 otherwise and direct us to do something different than what  
6 we've planned on.

7 Q. And is it the Department of Interior's understanding that  
8 this Court, the District Court in Cobell V and the Court of  
9 Appeals in Cobell VI, said that -- declared that the Department  
10 of the Interior had to provide an accounting for all funds for  
11 all beneficiaries, regardless of when those funds were  
12 deposited?

13 A. We have had many court decisions, as you know, Counselor,  
14 and we've gone through iterations with the Court of having  
15 decisions about what we should be doing in our historical  
16 accounting. And as you are well aware, we've had two structural  
17 injunctions that give us instructions about what kind of  
18 accounting that we need to do and those have been overturned.

19           So we are at this point in a position where we have  
20 laid out a plan about how we plan to undertake this work, and  
21 that plan is going to get looked at very carefully in this court  
22 proceeding. And at the end of that I anticipate that either the  
23 Court will say, okay, you've got a good plan or you need to  
24 change it in this way.

25 Q. Mr. Cason, I'm not sure you answered my question. But let

1 me move on to another one so we're very clear.

2 A. Okay.

3 Q. The decision of the Department of the Interior to not  
4 provide an accounting for closed accounts, or accounts that were  
5 closed as of October 25, 1994, is based on this legal  
6 interpretation?

7 A. Yes, that's my understanding.

8 Q. It's not based on cost, is it?

9 A. No.

10 Q. Now, the plan that -- you've talked really about two plans  
11 today; the 2003 plan and the 2007 plan. Correct?

12 A. Uh-huh. Yes.

13 Q. Now, those plans are referred to by the date of the plans as  
14 opposed to the plan number. Correct?

15 A. That's how I've done it this morning, yes.

16 Q. Yes. And if you were to refer to the 2007 plan by what plan  
17 number it is of the Department of the Interior, what plan number  
18 would it be?

19 A. I don't know. I don't count them that way.

20 Q. Okay. Would it be number eight or nine, though, to the best  
21 of your knowledge?

22 A. I don't know.

23 Q. Okay. But there have been -- you are aware there have been  
24 a number of plans before even the 2003 plan?

25 A. I'm aware that documents have been produced associated with

1 this. I don't know whether to characterize them as prior plans  
2 or not.

3 Q. Okay. There have been at least seven different plans of  
4 some type filed with this Court before the 2003 plan. Correct?

5 A. I don't know whether it's five, six, seven, eight, or nine.  
6 As I've told you, I don't count them that way.

7 Q. Okay. And now, to put it in the context of timing, because  
8 you did indicate that even the Department of the Interior knew  
9 schedule and timing was important. Correct?

10 A. Yes. That's correct.

11 Q. We are now going on the 13th anniversary later this month of  
12 the passage of the 1994 Act. Correct?

13 A. That sounds right, yeah.

14 Q. Now, when the 2003 plan was filed, the Department of the  
15 Interior told this Court that it would need five years to  
16 implement that plan under certain conditions. Correct?

17 A. Yes. Uh-huh.

18 Q. And so that would be five years would be the end of 2007?

19 A. Yes.

20 Q. And we are now nearing the end of 2007, and the Department  
21 of Interior's plan as of May 2007 is saying, give us four more  
22 years to the end of 2011. Correct?

23 A. That's correct.

24 Q. And while you indicated what the 2007 plan is essentially a  
25 continuation of the 2003 plan, with at least respect to the

1 land-based accounts, the 2007 plan contemplates doing only a  
2 mere fraction of what was called for in the 2003 plan. Would  
3 you agree with that?

4 A. The 2007 plan is different in character from the 2003 plan  
5 on land-based accounts, in that the number of transactions we  
6 plan to sample and reconcile is considerably smaller. And the  
7 reason that they're considerably smaller is that in the  
8 litigation support accounting effort we went through in drawing  
9 a statistical set of accounts and transactions, the findings  
10 from that were of a degree of accuracy that our statistical firm  
11 has recommended that we need far fewer transactions to assure  
12 accuracy of the accounts.

13 So yes, there's a reason-driven decision to do less  
14 work.

15 Q. Regardless of the reason, let's at least get out on the  
16 table what we're talking about when we're talking about doing  
17 less work. Okay? And we can go to the plans, but I suspect  
18 that they are familiar enough to you that you will know these  
19 numbers off the top of your head. But if we need to look at  
20 documents, let me know.

21 A. All right.

22 Q. With respect to land-based accounts, the 2003 plan  
23 contemplated doing a transaction-by-transaction reconciliation  
24 for all transactions over a dollar threshold of \$5,000.

25 Correct?

1 A. Correct.

2 Q. And that was estimated to be about 73,000 transactions that  
3 would be reconciled. Correct?

4 A. That sounds right.

5 Q. And in addition, it was going to take about 80,000  
6 transactions from the amount of \$500 to \$5,000. Correct?

7 A. That sounds right.

8 Q. And about another 80,000 transactions would be reconciled  
9 from \$500 and below. Correct?

10 A. That sounds right.

11 Q. So if my math is right, we've got 80,000, 80,000, plus  
12 73,000, for a total of 233,000 separate transactions which would  
13 be reconciled. Correct?

14 A. Correct.

15 Q. And those are all just during what is referred to as the  
16 electronic era. Right?

17 A. Yes.

18 Q. From 1985 to 2000?

19 A. Yes.

20 Q. Now, in the 2007 -- did the Department of the Interior ever  
21 begin performing the 2003 plan with respect to the land-based  
22 accounts?

23 A. Well, I would say yes, with our litigation support  
24 accounting process. We did not begin it with, I need to select  
25 80,000 transactions here and 80,000 transactions here. Rather,

1 we approached the job in a different way, which was subdividing  
2 the electronic era into all of the transactions over \$100,000,  
3 because, Counselor, as you know and you saw earlier, the meat is  
4 in the bigger transactions, and that the chaff is the huge  
5 volume of transactions that are very small.

6 And so we designed the litigation support accounting in  
7 a different way to learn what we could about what work we needed  
8 to do. We looked at the over \$100,000 transactions, and we took  
9 a statistical sample of the things below that, which included  
10 the strata of all of the pieces below 100,000, and did the  
11 evaluation of those.

12 And what we found in that process is that as a  
13 statistical matter, that the accounting system and the work that  
14 had been done by the department was pretty darn accurate. And  
15 that as a result, our statistical firm, in looking at the work  
16 that we have completed and the results that we got, suggested to  
17 us that doing more work would not be beneficial.

18 Q. Would not be beneficial to limiting the liability of the  
19 government? Is that what you mean?

20 A. That's not the purpose for doing all the work that we did.  
21 One of the things that, in my opinion, is an important element  
22 of this project is to shed light where we don't know what the  
23 results are going to be, and the Litigation Support Accounting  
24 process was something we thought we could do under the  
25 constraints given to us by appropriations language, but would



1 enable us to know more about what's involved in the land-based  
2 accounts associated with the IIM accounts.

3 And it enabled us to really look where the money is.  
4 That was an important thing. And it enabled us to take a look  
5 at what we should anticipate as the relative errors, the  
6 relative difficulty of finding the data associated with these  
7 accounts, and whether we needed to design the process in a  
8 different way.

9 So it was useful from a number of standpoints for us to  
10 undertake this work, and the findings have been helpful to us.

11 Q. Okay. Let me at least try to break it down like this: Did  
12 the Department of the Interior ever begin performing a  
13 reconciliation for all transactions in the electronic records  
14 era in excess of \$5,000?

15 A. Well, I would say yes. When you say, did we ever begin  
16 reconciling the transactions, we have selected transactions  
17 which we did reconcile; we selected all of the transactions over  
18 \$100,000, we selected a set of transactions that were under  
19 \$100,000. We did go through a reconciliation process on those  
20 transactions.

21 As I recall, we end up finding the documentation we  
22 needed in excess of 99 percent for all the transactions that we  
23 selected, and that we did, in the process, find a handful of  
24 errors in the process that were on both sides of the ledger, and  
25 that we were able to draw some conclusions as a statistical

1 matter, as to what the relative accuracy of the accounting  
2 system was for that time period.

3 Q. Mr. Cason, just so it's clear, we've established that the  
4 2003 plan anticipated doing a reconciliation of approximately  
5 233,000 individual transactions. Correct?

6 A. Yes.

7 Q. And that's during the electronic records era?

8 A. Yes.

9 Q. And there were additional ones for the paper records era  
10 that we'll get to in a minute?

11 A. Right. Okay.

12 Q. And the total number of transaction the 2007 plan envisions  
13 being reconciled for the paper records era are 6,599. Correct?

14 A. Okay. That sounds about the right ballpark.

15 Q. So when we talk about considerably less, we're going from  
16 233,000 to right at 6,600?

17 A. Yes.

18 Q. Now, with respect to the 2003 plan, there was an  
19 anticipation of doing some reconciliation of individual  
20 transactions in the paper record era. Correct?

21 A. Yes.

22 Q. And there were going to be a total of about 260,000  
23 transactions from the paper record era that were going to be  
24 sampled and reconciled during the -- for the 2003 plan.

25 Correct?

1 A. Yes.

2 Q. And that process never began, did it?

3 A. Not materially. We have been collecting all the information  
4 that we need to do that, and I think it's important just to not  
5 leave the pregnant pause about why we didn't start.

6 As you recall, I testified earlier --

7 Q. Well --

8 MR. DORRIS: Your Honor, I'm going to object. I just  
9 asked him if it started and the answer is no, and now he's  
10 trying to explain why it didn't start. I mean, we're going to  
11 be here a long time.

12 THE COURT: I'm sure he'll be asked that question on  
13 redirect. You can ask your next question.

14 MR. DORRIS: Thank you.

15 BY MR. DORRIS:

16 Q. Now, Mr. Cason, in the 2007 plan, it does indicate that  
17 there's going to be some reconciliation of individual  
18 transactions from the paper record era. Correct?

19 A. Correct.

20 Q. But it doesn't indicate at all how many are going to be  
21 examined. Is that right?

22 A. That's my understanding.

23 Q. Do you know how many are going to be examined?

24 A. I don't.

25 Q. Does anybody?

1 A. I don't know that.

2 Q. That hasn't been decided yet?

3 A. I don't know that.

4 Q. Okay. How can you come up and tell this Court that it's  
5 only going to take you now four more years to do this, when you  
6 don't even know how many transactions from the paper record era  
7 are going to be examined?

8 A. We anticipate that based upon the experience we've had thus  
9 far and the findings that we've had thus far, that we are able  
10 to design a sample -- now, let me back up. Let me say this a  
11 different way.

12 The task for us is to provide a historical accounting  
13 statement. From that, we look at our ledgers and other  
14 supporting documentation to assemble the historical statement of  
15 account. That's the task to be able to provide to individuals.

16 The reconciliation process is one that we believe,  
17 based on our experience, we can do with a statistical sample of  
18 accounts to be representative of the whole. And that based upon  
19 our findings thus far, we believe that we will be able, within  
20 the time frame, to select those samples, reconcile those  
21 samples, and if the error rate is similar to what we've found,  
22 do the job within the time line that we have established in our  
23 2007 plan.

24 If we find something that's materially different than  
25 what we anticipate, then it may take a different timeline to

1 finish.

2 Q. And how long a timeline --

3 THE COURT: Mr. Dorris, excuse me. It's 12:30. I have  
4 another thing scheduled at 12:30. That's our regular lunch  
5 date, so unless I'm interrupting some really important question,  
6 we'll break now for lunch.

7 MR. DORRIS: We can cover everything after lunch, Your  
8 Honor. Thank you.

9 THE COURT: Mr. Cason pointed out that there's no such  
10 thing as free lunch, and there isn't, but the cafeteria would  
11 appreciate your business. We'll be in recess for one hour.

12 MR. DORRIS: Thank you, Your Honor.

13 (Proceedings adjourned at 12:30 p.m.)

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Rebecca Stonestreet, certify that the foregoing is a  
correct transcript from the record of proceedings in the  
above-entitled matter.

\_\_\_\_\_  
SIGNATURE OF COURT REPORTER

\_\_\_\_\_  
DATE